TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 80.

THE IMPERIAL FIRE INSURANCE COMPANY OF LONDON, PLAINTIFF IN ERROR,

vs.

WILLIAM G. FARGO, AS PRESIDENT OF THE AMERICAN MERCHANTS' UNION EXPRESS COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JUNE 22, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 80.

THE IMPERIAL FIRE-INSURANCE COMPANY OF LONDON, PLAINTIFF IN ERROR,

vs.

WILLIAM G. FARGO, AS PRESIDENT OF THE AMERICAN MERCHANTS' UNION EXPRESS COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	*a*	1
Return	*b*	1
Certificate of clerk of common pleas	1	2
Petition of Imperial Fire Insurance Company	3	2
Bond	9	4
Notice of motion	15	6
Summons	18	6
Order removing cause to the United States circuit court	21	7
Declaration	25	8
Defendants' plea	40	23
Verdict	47	25
Judgment	47	25
Bill of exceptions	50	26
Assignment of errors	84	38
Joinder	88	39
Bond	90	40
Citation and service	92	40

a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

[SEAL.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between William G. Fargo, as president of the American Merchants' Union Express Company, plaintiff, and the Imperial Fire-Insurance Company of London, defendant, a manifest error hath happened, to the great damage of the said defendant, the Imperial Fire-Insurance Company of London, as is said, and as appears by its complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this second day of March, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-ninth.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is allowed.
March 2d, 1875.

SAM'L BLATCHFORD,
U. S. District Judge, and one of the Judges of said Circuit Court.

(Indorsed:) U. S. Supreme Court. The Imperial Fire-Insurance Company of London, pl'ff in error, vs. William G. Fargo, as president of the American Merchants' Union Express Company, def't in error. Writ of error. N. B. Hoxie, att'y for pl'ff in error. Filed M'ch 2, 1875.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

b I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one to ninety-three, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of the Imperial Fire-Insurance Company of London, plaintiff in error, against William G. Fargo, as president of the American Merchants' Union Express Company, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be

hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this fourth day of June, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the said United States the ninety-ninth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

1 Court of common pleas for the city and county of New York.

WILLIAM G. FARGO, AS PRESIDENT, ETC.,
against
THE IMPERIAL FIRE-INSURANCE COMPANY OF London.

I, Nathaniel Jarvis, j'r, clerk of the court of common pleas for the city and county of New York, do hereby certify that the following petition, bond, summons, order, the said summons being the process whereby the above-entitled action was commenced, are copies of the original thereof on file in my office, and of the whole of said original.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court this 17th day of June, 1872.

[SEAL.] NATH'L JARVIS, J'R, *Clerk.*

2 Court of common pleas in and for the city and county of New York.

WILLIAM G. FARGO, AS PRESIDENT OF THE American Merchants' Union Express Company, plaintiff,
against
THE IMPERIAL FIRE-INSURANCE COMPANY OF London, defendant.

Please take notice that the defendant above named hereby appears in the above-entitled action, and that I am retained and appear as attorney for the said defendant therein.

Dated New York, April 30, 1872.

Yours, &c.,

N. B. HOXIE,
Defendant's Attorney, 67 William St., New York.

To Messrs. VAN VORST AND BEARDSLEE,
Plaintiff's Attorneys.

NATH. JARVIS, J'R, Esq.,
Clerk of Court of Common Pleas.

3 Court of common pleas in and for the city and county of New York.

WILLIAM G. FARGO, AS PRESIDENT OF THE American Merchants' Union Express Company, plaintiff,
against
THE IMPERIAL FIRE-INSURANCE COMPANY of London, defendant.

To the court of common pleas in and for the city and county of New York.

The petition of the Imperial Fire Insurance Company of London, the defendant in the above-entitled action respectfully shows:

That an action has been commenced in the court against your peti-

tioner by William G. Fargo, as president of the American Merchants' Union Express Company, the above-named plaintiff, by the service of a summons upon E. W. Crowell, the manager and agent of your petitioner,

4 on the 11th day of April, 1872, to recover, as appears by said summons in the said action, a sum exceeding five hundred dollars exclusive of costs, to wit, the sum of four thousand five hundred and twenty-eight $\frac{44}{100}$ dollars, and interest.

That the claim of said plaintiff in said action is for loss and damage alleged to have been sustained by fire, and is based upon a certain contract or policy of insurance issued by said Crowell for and on behalf of this defendent to and insuring the said The American Merchants' Union Express Company against loss or damage by fire.

That the time for the defendant to answer in said action has not expired, and that the matter in dispute in said action, as appears by said summons, exceeds the sum of five hundred dollars exclusive of costs.

That the said The American Merchants' Union Express Company, as your petitioner is informed and verily believes and avers, is a joint-stock company or association created and existing under the laws of the State of New York.

5 And your petitioner is informed and verily believes and avers that the said William G. Fargo and the said The American Merchants' Union Express Company are and each of them is a citizen of the State of New York.

That your petitioner is a corporation created by and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland. That your petitioner is an alien.

That your petitioner intends duly to enter its appearance in this action simultaneously with the filing of this the petition, and herewith offers good and sufficient surety for its entering in the next circuit court of the United States for the southern district of New York, in the second circuit on the first day of its session, copies of the process herein against your petitioner in this action and also for its then and there appearing and entering special bail therein, if special bail were originally requisite therein according to the law and practice of the United States and its courts.

6 Wherefore your petitioner prays that this action may be removed for trial into the next circuit court of the United States, to be held in and for the southern district of New York in the second circuit pursuant to the provisions of the statutes of the United States in such case made and provided, and that this court do accept the surety herewith offered by your petitioner as aforesaid, and proceed no farther in this action, and that such further or other order may be made in the premises as may be proper.

And your petitioner will ever pray, &c.

Dated April 30, 1872.

IMPERIAL FIRE INS. CO., LONDON.
E. W. CROWELL,
President Manager.

N. B. HOXIE, *Attorney for Petitioner.*

7 STATE OF NEW YORK.
City and County of New York, ss:

Edgar W. Crowell, being duly sworn, says that he is the duly constituted and authorized manager and agent and attorney in fact in the United States of the Imperial Fire-Insurance Company of London, the petitioner above named.

That he has read the foregoing petition subscribed as such manager and agent of and for said petitioner, and knows the contents thereof.

That the same is true to the knowledge of deponent except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

That all the material allegations therein are within his personal knowledge.

That deponent's knowledge and the grounds of his belief as to the matters in said petition stated are as follows:

The summons in said petition mentioned was served upon deponent on the 11th day of April, 1872, and deponent has read the same.

That the policy of insurance in said petition mentioned and
8 whereon the claim or demand in this action arises was issued by deponent as manager and agent of and for said petitioner.

That deponent has been informed by officers of said petitioner of the origin and incorporation of said petitioner, and its place of existence, and has, for some time past, been, and now is, in regular communication with said petitioner.

Deponent has been informed by Aug. R. McMahon, of New York, that the said The American Merchants' Union Express Company is a joint-stock association or company, created and existing under the laws of the State of New York, and that said William G. Fargo is a citizen of said State.

That the reason why said petition is not verified by said petitioner is that no officer of said petitioner is within the United States; but all of said officers are in England, where they respectively reside.

E. W. CROWELL.

Subscribed and sworn to before me this 30th day of April, A. D. 1872.

AUG. R. McMAHON,
Notary Public, N. Y. Co.

9 Know all men by these presents, that we, Stephen Crowell, of No. 173 Broadway, city of New York, president of the Phœnix Insurance Company, and Philander Shaw, of No. 173 Broadway, city of New York, secretary of the Phœnix Insurance Company, are held and firmly bound unto William G. Fargo, as president of the American Merchants' Union Express Company, his successors and assigns, in the sum of one thousand dollars, lawful money of the United States, to be paid to the said William G. Fargo, as president of the American Merchants' Union Express Company, his successors or assigns. For which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, and each and every of them forever, firmly by these presents. Sealed with our seals. Dated the thirtieth day of April, one thousand eight hundred and seventy-two.

Whereas the above-named William G. Fargo, as president of the
10 American Merchants' Union Express Company, has commenced an action in the court of common pleas, in and for the city and county of New York, against the Imperial Fire-Insurance Company of London, a corporation created by and organized and existing under the laws of the United Kingdom of Great Britain and Ireland, an alien; and the matter in dispute in said action exceeds the sum or value of five hundred dollars, exclusive of costs. And whereas the said The Imperial Fire-Insurance Company of London is about to enter its appearance in such action in said court, and at the same time to file its petition, pursuant to the act of Congress in such case made and provided, for the removal of the said cause for trial into the next circuit

court of the United States, to be held in and for the southern district of New York, in the second circuit:

Now, therefore, the condition of this obligation is such that, if the said The Imperial Fire-Insurance Company of London shall enter in said circuit court of the United States, to be held in and for the southern district of New York in the second circuit, on the first day its
11 session after the removal of the said action thereto, copies of the said process of the said William G. Fargo, as president of the American Merchants' Union Express Company, against the said The Imperial Fire-Insurance Company of London, in said action, and shall then and there appear in the said cause in the said circuit court and enter special bail in the same cause, if special bail was originally required therein, according to the law and practice of the United States and its courts, then this obligation shall be void; otherwise to remain in full force and effect.

STEPHEN CROWELL. [L. S.]
PHILANDER SHAW. [L. S.]

Sealed and delivered in presence of—
AUG. R. McMAHON.

STATE OF NEW YORK,
City and County of New York, ss:

Stephen Crowell, one of the sureties in and to the foregoing bond, being duly sworn, says that he is a resident and freeholder within the State of New York, and that he is worth the sum of two thousand dollars over and above all his debts and liabilities and properly
12 exempt by law from levy and sale under execution.

STEPHEN CROWELL.

Subscribed & sworn to before me, this 30th day of April, 1872.
AUG. R. McMAHON,
Notary Public, New York County.

STATE OF NEW YORK,
City & County of New York, ss:

Philander Shaw, one of the sureties in and to the foregoing bond, being duly sworn, says that he is a resident and freeholder within the State of New York, and that he is worth the sum of two thousand dollars over and above all his debts and liabilities and properly exempt by law from levy and sale under execution.

PHILANDER SHAW.

Subscribed and sworn to before me, this 30th day of April, 1872.
AUG. R. McMAHON,
Notary Public, N. Y. Co.

STATE OF NEW YORK,
City & County of New York, ss:

On this thirtieth (30th) day of April, A. D. 1872, before me personally appeared Stephen Crowell and Philander Shaw, to me severally personally known to be the persons described in and who executed the
13 foregoing instrument, and they severally acknowledged to me that they executed the same for the uses and purposes mentioned.

Witness my hand and official seal.

[L. S.] AUG. R. McMAHON,
Notary Public, New York Co.

(Indorsed:) Within bond approved. N. Y., May 18, 1872. J. F. D. H. C. P.

15 Court of common pleas in & for the city & county of New York

WILLIAM G. FARGO, AS PRESIDENT OF THE American Merchants' Union Express Company, plaintiff,
against
THE IMPERIAL FIRE-INSURANCE COMPANY OF London, defendant.

Please take notice, that upon the petition of the above-named defendant, which was this day duly filed in the office of the clerk of this court, and with a copy of which you are herewith served, and upon the appearance of the defendant in this action this day duly filed and entered in said clerk's office and herewith served, and upon the summons served in this action, and the bond hereinafter mentioned, a motion will be made before one of the judges of this court, at a special term thereof, to be held at chambers, in the court-house, in the city of New York, on the tenth day of May, 1872, at the opening of court on that day,
16 or as soon thereafter as counsel can be heard, for the removal of this action from this court into the circuit court of the United States for the southern district of New York, in the second circuit, and for such other or further order as the court may think proper to grant. And that a bond, with good and sufficient sureties, as required by law, which was this day filed with said clerk, and with a copy of which you are herewith served, and which is offered by the defendant herein, as required by law, and then and there be tendered to the said court, or one of the judges thereof, for acceptance and approval.

Dated New York, May 1, 1872.

Yours, &c.,

N. B. HOXIE,
Attorney for Def't.

To Messrs. VAN VORST & BEARDSLEE,
Plaintiff's Attorney.

17 (Indorsed:) Court of common pleas, city and county of New York. William G. Fargo, as president of the American Merchants' Union Express Company, against The Imperial Fire-Insurance Company of London. Notice of appearance, bond, petition, and notice of motion. N. B. Hoxie, def'ts att'y, 67 W'm st., New York. Read, on motion, 10 May, 1872.

Service of a copy of within bond and petition, and with notices of which within are copies is hereby admitted.

N. Y., May 1, 1872.

VAN VORST & BEARDSLEE,
Pl'ff's Att'ys.

Filed May 1, 1872.

18 *Summons for a money demand on contract.—Com. not ser.*

Court of common pleas in and for the city and county of New York.

WILLIAM G. FARGO, AS PRESIDENT OF THE American Merchants' Union Express Company, plaintiffs,
against
THE IMPERIAL FIRE-INSURANCE COMPANY OF London, defendants.

To the above-named defendants:

You are hereby summoned and required to answer the complaint in

this action which will be filed in the office of the clerk of the court of common pleas in and for the city and county of New York, at the city hall in the city of New York, and to serve a copy of your answer to the said complaint on the subscribers at their office, number 106 Broadway, New York City, within twenty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum of four thousand five
19 hundred and twenty-eight $\frac{41}{100}$ dollars, with interest from the ninth day of April, one thousand eight hundred and seventy-two, besides the costs and disbursements of this action.

Dated New York, April 9, 1872.

VAN VORST & BEARDSLEE,
Plaintiff's Attorneys, 106 Broadway, New York.

20 (Indorsed:) New York common pleas. William G. Fargo, president of the American Merchants' Union Express Company, against The Imperial Fire-Insurance Company of London. Copy summons. Van Vorst & Beardslee, pl'ffs attorneys, 106 Broadway, New York. Rec'd April 11, 1872. Read, on motion, to the defendant, The Imperial Fire-Insurance Company of London.

21 At a special term of the court of common pleas held in and for the city and county of New York, at the court-house in said city, on the tenth day of May, A. D. 1872.

Present, Hon. Joseph F. Daly, judge.

WILLIAM G. FARGO, AS PRESIDENT OF THE American Merchants' Union Express Company,
against
THE IMPERIAL FIRE-INSURANCE COMPANY of London.

On reading and filing the petition of the defendant above named, duly verified, praying that this action be removed for trial into the next circuit court of the United States, to be held in and for the southern district of New York in the second circuit, and that this court will accept the surety offered with the said petition, and proceed no further in this
22 action: Said petition and bond having been duly signed in the office of the clerk of this court on the first day of May, 1872, and the said defendant having entered its appearance in this action simultaneously with the filing of the said petition, and on reading and filing notice of motion to remove said cause, and due proof of due service of said petition, bond, notice of appearance, and notice of motion on the plaintiff's attorneys, and copy summons in said petition mentioned, and after hearing N. B. Hoxie, attorney for said defendant, in support of said petition, and Hamilton Hale, esq., for defendant, in opposition thereto:

It is ordered that the prayer of said petition be granted, and that this action be and the same is hereby removed for trial from this court into the next circuit court of the United States to be held in and for the southern district of New York, in the second circuit, and that the surety offered with the said petition be and the same is hereby accepted and approved. And it is further ordered that this court proceed no further in this action.

Ent.

J. F. D.,
J. C. C. P.

23 (Indorsed :) Court of common pleas in and for New York County. William G. Fargo, as president, &c., against The Imperial Fire-Insurance Company of London. Order removing cause. N. B. Hoxie, att'y def't. Filed Oct. 21, '72. Filed 10th May, 1872.

24 U. S. circuit court for the southern district of New York, in the second circuit.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, of the term of October, 1872, to wit, of the 9th day of January, in the year of our Lord one thousand eight hundred and seventy-three.

Witness the honorable Lewis B. Woodruff, one of the judges of the said circuit court. Kenneth G. White, clerk.

SOUTHERN DISTRICT OF NEW YORK, *ss :*

Be it remembered that on the 10 day of December, 1872, in the October term in the said year, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, came William G. Fargo, as president of the American Merchants' Union Express Company, by Van Vorst and Beardslee, attorneys for said company, and brought into the said court before the judges
25 aforesaid their certain declaration against the Imperial Fire-Insurance Company of London, being in custody, &c., of a plea of trespass on the case upon promises : which said declaration follows, in these words, that is to say :

UNITED STATES CIRCUIT COURT.
Southern district of New York :

WILLIAM G. FARGO, AS PRESIDENT OF THE American Merchants' Express Company,
ag'st
THE IMPERIAL FIRE-INSURANCE COMPANY of London.

The declaration of the plaintiffs above named respectfully shows:

That the American Merchants' Union Express Company were, at the times hereinafter mentioned, and are now, a joint-stock company or association, consisting of seven or more shareholders or associates, and that at the times hereinafter mentioned William G. Fargo was, and still is, the president of said joint-stock company or association.

26 That, at the times hereinafter mentioned, the said company were and still are engaged in the business of transporting and forwarding goods and merchandize as common carriers, between different parts of the United States.

That, at the times hereinafter mentioned, the defendants were, and they still continue to be, an incorporation doing the business of fire insurance, organized and created under and by virtue of the laws of the Kingdom of Great Britain and Ireland, and carrying on and conducting their said business in the city of New York.

For a first cause of action :

That on or about the 21st day of May, 1872, at the city of New York,

in consideration of the payment by the plaintiffs to the defendants of the premium of three thousand dollars, the defendants by their agents duly authorized thereto, made their policy of insurance in writing, a copy of which is hereto annexed and marked "Exhibit A," and thereby insured the plaintiffs, the said The American Merchants' Union Express Company, from the 20th day of May, 1870, to the 20th day of May,
27 1871, from loss or damage by fire, to the amount of twenty thousand dollars, on goods, wares, and merchandize, in the care of said company for transportation while on board the cars or other conveyances, including water and stage routes, embracing the entire routes of said company as laid down in a certain map referred to in said policy.

That on or about the 6th day of February, 1871, certain goods, wares, and merchandise in the care of said company for transportation, while on board cars and upon one of the routes of said company, as laid down upon the map referred to in said policy, to wit, The New York Central and Hudson River Railroad, and near New Hamburgh, upon said road, were destroyed by fire, which did not happen or arise from any of the causes excepted in said policy, but arose from a collision of two trains upon said road.

That the goods, wares, and merchandise destroyed as aforesaid, and for the value of which claim is herein made, were not, nor was any part of the same of the kind or description which are excepted from the operation of said policy of insurance by the terms and conditions
28 thereof; that the value of the said goods, wares, and merchandise destroyed as aforesaid, and included in and covered by the said policy of insurance, was the sum of twenty-two thousand five hundred and twelve $\frac{55}{100}$ dollars, and that the said express company has paid the value of the said goods, wares, and merchandise to the respective owners thereof.

That there was at the time of said fire upon the goods, wares, and merchandise in the care of the said express company for transportation, other similar insurance to the amount of over eighty thousand dollars, as follows, to wit:

By a certain policy issued by the Mechanics and Traders' Fire-Insurance Company, the sum of three thousand four hundred and twenty-one $\frac{72}{100}$ dollars, ($3,421.72.)

By two certain policies issued by the Occidental Fire-Insurance Company of California, the sum of twelve thousand and thirty-five $\frac{22}{100}$ dollars, ($12,035.22.)

By a certain policy issued by the Hartford Fire-Insurance Company, the sum of ten thousand dollars, ($10,000.)

By a certain policy issued by the Liverpool and London and
29 Globe Insurance Company, the sum of thirty thousand dollars, ($30,000.)

By a certain policy issued by the Great Western Insurance Company, the sum of ten thousand dollars, ($10,000.)

By a certain policy issued by the Beekman Fire-Insurance Company, the sum of ten thousand dollars, ($10,000.)

By a certain policy issued by the Franklin Fire-Insurance Company of Philadelphia, the sum of five thousand dollars, ($5,000.)

By a certain policy issued by the Manufacturers' Insurance Company, the sum of five thousand dollars, ($5,000.)

And by a certain other policy issued by The Imperial Fire-Insurance Company of London, the defendants herein, the sum of seven thousand one hundred and seventy-two $\frac{71}{100}$ dollars, ($7,172.71.)

That the policy of insurance issued by these defendants, and of which

a copy is hereunto annexed and marked "Exhibit A," had, previous to the loss hereinbefore mentioned, been reduced in amount by the payment of certain losses that had occurred under it, and that the present value of said policy at the time of the loss hereinbefore set
30 forth, and the amount at said time insured thereby, was the sum of fourteen thousand three hundred and forty-five $\frac{41}{100}$ dollars, ($14,345.41.)

That the plaintiffs, The American Merchants' Union Express Company, duly fulfilled all the conditions of said insurance on their part, and more than sixty days before the commencement of this action, to wit, on or about the 8th day of February, 1872, at the city of New York, gave to the defendants due notice and proof of the fire and loss aforesaid, and duly demanded payment of the sum of three thousand and eighteen $\frac{94}{100}$ dollars, ($3,018.94,) their proportion of said loss under their policy of insurance hereinbefore set forth.

That no part of the same has been paid, and the said sum is now due thereon from the defendants to the plaintiffs, the said The American Merchants' Union Express Company.

And for a second cause of action, these plaintiffs show to the court:

That on or about the 27th day of September, 1870, at the city of New York, in consideration of the payment by the plaintiffs to the defendants of the premium of fifteen hundred dollars the defendants, by their agents duly authorized thereto, made their policy of insurance in
31 writing, a copy of which is hereto annexed and marked "Exhibit B," and thereby insured the plaintiff's, the said The American Merchants' Union Express Company, from the 26th day of September, 1870, to the 26th day of September, 1871, from loss or damage by fire to the amount of ten thousand dollars on goods, wares, and merchandise in the care of said company for transportation, while on board cars or other conveyances, including water and stage routes, embracing the entire routes of said company as laid down on a certain map referred to in said policy.

That on or about the 6th day of February, 1871, certain goods, wares, and merchandise in the care of the said company for transportation, while on board cars and upon one of the routes of said company as laid down upon the map referred to in said policy, to wit, the New York Central and Hudson River Railroad, and near New Hamburgh, upon said road, were destroyed by fire, which did not happen or arise from any of the causes excepted in said policy, but arose from a collision of two trains upon said road.

That the goods, wares, and merchandise destroyed as aforesaid,
32 and for the value of which claim is herein made, were not, nor was any part of the same, of the kind or description which are excepted from the operation of said policy of insurance by the terms and conditions thereof; that the value of the said goods, wares, and merchandise destroyed as aforesaid and included in and covered by the said policy of insurance, was the sum of twenty-two thousand five hundred and twelve $\frac{53}{100}$, and that the said express company has paid the value of the said goods, wares, and merchandise to the respective owners thereof.

That there was, at the time of said fire, upon the goods, wares and merchandise in the care of the said express company for transportation, other similar insurance to the amount of over ninety thousand dollars, as follows, to wit:

By a certain policy issued by the Mechanics and Traders' Fire-Insurance Company, the sum of three thousand four hundred and twenty-one $\frac{72}{100}$ dollars, ($3,421.72.)

By two certain policies issued by the Occidental Fire-Insurance Company of California, the sum of twelve thousand and thirty-five $\frac{22}{100}$ dollars, (12,035.22.)

By a certain policy issued by the Hartford Fire-Insurance Company, the sum of ten thousand dollars, ($10,000.)

33 By a certain policy issued by the Liverpool & London & Globe Insurance Company, the sum of thirty thousand dollars, ($30,000.)

By a certain policy issued by the Great Western Insurance Company, the sum of ten thousand dollars, ($10,000.)

By a certain policy issued by the Beekman Fire-Insurance Company, the sum of ten thousand dollars, ($10,000.)

By a certain policy issued by the Franklin Fire-Insurance Company of Philadelphia, the sum of five thousand dollars, ($5,000.)

By a certain policy issued by the Manufacturers' Insurance Company, the sum of five thousand dollars, ($5,000); and by a certain other policy issued by the Imperial Fire-Insurance Company of London, the defendants herein, the sum of fourteen thousand three hundred and forty-five $\frac{41}{100}$ dollars, ($14,345.41.)

That the policy of insurance issued by these defendants, and of which a copy is hereunto annexed and marked "Exhibit B," had, previous to the loss hereinbefore mentioned, been reduced in amount by the payment of certain losses which had occurred under it, and that the present value of said policy, at the time of the loss hereinbefore set

34 forth, and the amount at said time insured thereby, was the sum of seven thousand one hundred and seventy-two $\frac{71}{100}$ dollars, ($7,172.71.)

That the plaintiffs, the American Merchants' Union Express Company, duly fulfilled all the conditions of said insurance on their part, and more than sixty days before the commencement of this action, to wit, on or about the 8th day of February, 1872, at the city of New York, gave to the defendants due notice and proof of the fire and loss aforesaid, and duly demanded payment of the sum of fifteen hundred and nine $\frac{47}{100}$ dollars, ($1,509.47,) their proportion of said loss under their policy of insurance hereinbefore set forth in the second cause of action. That no part of the same has been paid, and that the said sum is now due thereon from the defendants to the plaintiffs, the said The American Merchants' Union Express Company.

Wherefore the plaintiffs demand judgment against the defendants for the sum of four thousand five hundred and twenty-eight $\frac{41}{100}$ dollars, with interest thereon from the ninth day of April, 1872, besides the costs and disbursements of this action.

VAN VORST & BEARDSLEE,
Pl'ffs' Att'ys.

35 STATE OF NEW YORK,
City & County of New York, ss:

William G. Fargo, being duly sworn, says that he is the president of the American Merchants' Union Express Company, the plaintiffs in the above-entitled action: that the foregoing declaration, and each and every part thereof, is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true.

W'M G. FARGO.

Sworn to before me this sixth day of December, 1872.
CHA'S S. NEWCOMB,
Notary Public, New York.

36 EXHIBIT A.

THE IMPERIAL FIRE-INSURANCE COMPANY OF LONDON.—OFFICE, PINE STREET, NEW YORK.

Policy No. 674329. [Coat-of-arms.] $20,000.

LONDON BOARD OF DIRECTORS.—Ashton, Richard James, esq.; Barclay, Thomas George, esq.; Bell, James Christian Clement, esq.; Bevan, Robert Cooper Lee, esq.; Brand, James, esq.; Cave, Charles, esq.; Chapman, Edward Henry, esq.; Davidson, Henry, esq.; Field, George, esq.; Gibb, Thomas Jones, esq.; Gilliat, John Saunders, esq.; Henning, Capt. Alexan., R. N.; Hibbert, George, esq.; Hume, William Burnley, esq.; Hyde, Samuel, esq.; Kirkland, Sir John; Lyall, William, esq.; Marryat, Charles, esq.; Murdoch, James Gordon, esq.; Neilson, Claude, esq.; Newman, Thomas Holdsworth, esq.; Pattison, Frederick, esq.; Rigge, John Sanderson, esq.; Scott, James, esq.; Smith, Martin Tucker, esq.; Twining, Richard, esq.

AUDITORS.—Astell, John Harvey, esq.; Eaton, H. W., esq., M. P.; Farquhar, Horace, esq.; Field, Barclay, esq.; Reid, G. J. Graystone, esq.

LOCAL BOARD OF DIRECTORS.—Archibald, Edward M., esq., chairman; Salomon, David, esq., deputy chairman, 9 West 48th street; Irvin, Richard, esq.—Richard Irvin & Co.; Jaffray, Edward S., esq.—E. S. Jaffray & Co.; Johnston, J. Boorman, esq.—J. Boorman, Johnston & Co.; Low, A. A., esq.—A. A. Low & Brothers; Stuart, James, esq.—J. & J. Stuart & Co.

RESIDENT MANAGER.—E. W. Crowell.

ASSISTANT MANAGER.—Joseph B. S't John.

Whereas American Merchants' Union Express Company paid to the Imperial Fire-Insurance Company the sum of three thousand dollars, for insurance from loss or damage by fire, viz: On goods, wares, & merchandise in their care for transportation, while on board cars or other conveyances, including water & stage routes, embracing the entire routes of said company, which routes are designated by red lines or yellow lines on a map furnished by assured, on file in the office of Benson B. Smith, No. 11 Wall st., N. Y.: It is agreed, as a condition of this policy, that it is to attach only on the above-mentioned property while actually on board cars or other conveyances, as above described, or while in transit to and from the different places on the routes of said company as above designated, and while loading and reloading at any point on said routes. And whereas the assured, in their contracts with railroads or other companies, associations, or individuals on said routes, have agreed to waive all claims on them for damages as common carriers or otherwise, it is understood and agreed that the said companies, associations, or individuals are not to be held liable or accountable by this company for any loss that may occur. It is a condition of this insurance that there shall be obtained and kept thereon other similar insurance to the amount of at least eighty thousand dollars, and in case of loss or damage this policy shall contribute not exceeding the proportion which this policy bears to the full sum of one hundred thousand dollars. It is a further condition of this insurance that no loss is to be paid in case of collision, except fire ensue, and then only for the loss and damage by fire. And that no loss is to be paid arising from petroleum or other explosive oils.

Other insurance permitted without notice until required. One year at 15 per cent. from May 20th, 1870.

$20,000	1 yr. @ 15 %.	$3,000.00.

Now be it known that, in consideration of such payment, the capital stock and fund of the said Imperial Fire-Insurance Company shall be subject and liable to pay to the assured, their executors, administrators, or assigns, all such loss or damage, not exceeding in amount the sum of twenty thousand dollars, as shall happen by fire to the property as above specified, during one year, to wit, from the twentieth day of May, one thousand eight hundred and seventy, (at 12 o'clock at noon,) until the twentieth day of May, one thousand eight hundred and seventy-one, (at 12 o'clock at noon,) the said loss or damage to be estimated according to the actual cash value of the property at the time the same shall happen; and to be paid within sixty days after due notice and proof thereof made by the assured, in conformity to the following conditions:

Provided always, and it is hereby declared, that this corporation shall not be liable to make good any loss or damage by fire which may happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire, or for loss on or damage to stock, or goods of any kind, which shall or may happen to the same while undergoing any process in or by which the application of fire-heat is necessary. And provided further, that if any other insurance has been or shall hereafter be made upon the said property and not consented to by this company in writing hereon, or if the said property shall be sold or conveyed, or the interest of the parties therein changed, or if this policy shall be assigned without the consent of the company obtained in writing herein, or if the assured shall make any attempt to defraud the company, then, and in every such case, this policy shall be null and void. In case of loss, the insured shall not be entitled to demand or recover on this policy any greater proportion of loss or damage sustained to the subject insured than the amount hereby insured shall bear to the whole amount insured (whether the same shall be valid or not) on the said property. And it is agreed, and declared to be the true intent and meaning of the parties hereto, that in case the above-mentioned premises are, at any time during the period for which this policy would otherwise continue in force, used for more hazardous purposes than that called for in the original contract of insurance, or if it be vacant and unoccupied, or the hazard otherwise increased, or if it be a manufacturing establishment, running in whole or in part over or extra time, or running at night, without special agreement endorsed on this policy, this policy shall be of no force or effect. And it is moreover agreed and declared that this insurance is not intended to apply to or cover any books of account, written securities, deeds, or other evidences of title to property; nor to bonds, bills, notes, or other evidences of debt; nor to money or bullion; and that casts, curiosities, engravings, jewelry, jewels, medals, models, musical and scientific instruments, (piano-fortes in dwelling-houses excepted,) paintings, patterns, plates, precious stones, printed music, prints, sculpture, statuary, and watches are not deemed to be included in any insurance, unless particularly specified in writing in the policy. In case of loss, not more than fifty dollars will be allowed on any one picture or print unless a valued catalogue shall have been previously deposited in the office.

1. Applications for insurance on property must be in writing, and must specify the construction and materials of the building to be insured, or containing property to be insured, by whom occupied, whether

as a private dwelling or how otherwise, its situation with respect to contiguous buildings, and their construction and materials, and whether any manufacturing is carried on within or about it; and in relation to the insurance of goods and merchandise the application must state whether or not they are of the description denominated hazardous, extra hazardous, or specially hazardous, and such survey and description shall be taken and deemed to be a part and portion of the policy issued thereon, and a warranty on the part of the insured.

2. If any person effecting insurance in this company shall make any misrepresentation or concealment touching the risk to be assumed, or if, during the existence of this policy, or any renewal thereof, the risk shall be increased by any means by the occupation of the premises for more hazardous purposes than are permitted by this policy, or if the insured, at or before the taking of any renewal, shall fail to notify the company of any increase of the hazard, whether within or without the premises, and have the same indorsed hereon, this policy shall be void. Every renewal shall be deemed to be made upon the faith of the representation on which the original policy was granted, unless superseded by a new description of the risk.

3. This insurance may be terminated at any time, at the request of the insured, in which case the company may retain the customary short rates for the time the policy has been in force. The insurance may also be at any time terminated at the option of the company, on giving notice to that effect and by paying a ratable proportion of the premium for the unexpired term of the policy, on demand.

4. If the property to be insured be held in trust or on commission, or be a leasehold or other interest not absolute, it must be so represented to the company and expressed in the policy in writing, otherwise the insurance as to such property shall be void; and in case of loss, the names of the respective owners shall be set forth in the preliminary proofs of such loss, with their respective interests.

The clause "held in trust or on commission, or sold but not delivered," covers only the property of the assured, or upon property which the same has an interest in for commission, or other charges, (and if for commissions, advances, or other charges, only to the extent of the same,) or upon property held for others which the assured has agreed in writing to protect by insurance, and is responsible for the same, or property that has been duly entered upon the book or books of the assured, in the name of a purchaser, and not delivered.

Goods held on storage must be separately and specifically insured.

5. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium.

6. Re-insurance for any other insurance company to be on the basis of joint liability with said company; and in the event of loss the company to pay pro rata at and in the same time and manner as the company re-insured. If claim shall be made against this company by a mortgagee holding this policy as collateral security, and this company shall pay the same and claim that as to the mortgagor or owner no liability existed, this company shall at once be legally subrogated to all the rights of the mortgagee under all the securities held as collateral to the mortgage debt, to the extent of such payment, or, at its option, may pay the mortgagee the whole principal due or to become due on the mortgage, with interest, and shall receive therefor a full assignment and transfer of the same, and all other securities held as collateral to the mortgage debt.

And whenever this company shall pay any loss, the assured agrees to

assign over all his rights to recover satisfaction therefor from any other person or persons, town, or other corporation, or to prosecute therefor at the charge and for the account of the company, if requested.

7. If at the happening of any fire the insured shall have insurance under a floating policy or policies, not specific, but covering goods generally, in various places not designated, and yet within limits which include the premises or property herein insured, such policy, as between the insured and this company, shall be considered as co-insurance with this policy, anything in the floating policy to the contrary notwithstanding.

8. In case of claim for loss or damage on a policy assigned, where there is no actual sale or transfer of the property insured, proofs of loss shall be made by the insured, in conformity with the conditions of this policy, in the same manner as if no assignment had been made; otherwise this policy shall be void and of no force or effect whatever, and all liability on the part of this company shall cease.

9. It is mutually understood that there can be no abandonment to the insurers of the subject insured in case of loss or damage by fire.

10. Persons sustaining loss or damage by fire shall forthwith give notice thereof in writing to the company, or its agent, and, as soon after as possible, they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed with their own hands; and they shall accompany the same with their oath or affirmation, declaring the said account to be true and just; showing also the ownership of the property insured; what other insurance, if any, existed on the same property, and give a copy of the written portion of the policy of each company; what was the whole cash value of the subject insured; what was their interest therein; in what general manner (as to trade, manufactory, merchandise, or otherwise) the building insured or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building; and when and how the fire originated, so far as they know or believe; they shall also produce a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds, most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferers, stating that he has examined the circumstances attending the fire, loss, or damage alleged; that he is acquainted with the character and circumstances of the insured or claimants, and that he verily believes that he, she, or they have, by misfortune, and without fraud or evil practice, sustained loss and damage on the subject insured to the amount which such magistrate, notary public, or commissioner of deeds shall certify. The assured shall, if required, submit to an examination or examinations, under oath, by any person appointed by the company, and subscribe to such examination when reduced to writing.

When merchandise or other personal property is partially damaged, the insured shall forthwith cause the same to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kind, separating the damaged from the undamaged, and shall cause a list or inventory to be made and furnished to the company of the whole, naming the quantity and cost of each. In case differences shall arise concerning the amount of loss, the amount of sound value and damage shall then be ascertained by the examination and appraisal of each article by disinterested appraisers, mutually agreed upon, one-half of the appraisers' fees to be paid by the insurers; and the assured shall, if required, submit to an examination, under oath, by

the agent or attorney of the company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, or to their claim thereupon, and subscribe to such examination, the same being reduced to writing; and, whenever required in writing, the insured or persons claiming shall produce and exhibit his books of account and other vouchers to the insurers or their agents, at the office of this company, in support of his claim, and permit extracts and copies thereof to be made; and shall also produce certified copies of any bills or invoices of property destroyed or damaged, the originals of which may have been lost, mislaid, or destroyed; and shall also exhibit to any persons named by the company, and shall permit to be examined by them, any property damaged on which any loss is claimed, or any property saved which was insured by this policy; and until such proofs, declarations, and certificates are produced, and such appraisals and examinations of property permitted by the claimant, the loss shall not be payable.

All fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy.

11. In case of any loss or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and quality, or to take the goods at their appraised value, or to rebuild or repair the building or buildings, within a reasonable time, giving notice of their intention so to do within thirty days after having received the preliminary proofs of loss required by the tenth article of these conditions; and the assured shall, if required, furnish plans and specifications of the building or other property destroyed. In case differences shall arise concerning the amount of any loss or damage by fire, the matter shall, at the written request of either party, be submitted to the judgment of arbitrators, indifferently chosen, whose award in writing, as to the amount of such loss and damage, shall be binding on the parties: but such award shall not determine any question as to the liability of this company under this policy.

The cash value destroyed or damaged by fire shall in no case exceed what would be the cost to the assured at the time of the fire of replacing the same; and in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of replacing shall be made, to ascertain the actual cash value.

12. This company will not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stone or brick chimney, or in consequence of neglect or of deviation from the laws or regulations of police made to prevent accidents from fire, in places where laws and regulations on this subject exist.

13. It is furthermore hereby expressly provided that no suit or action of any kind against said company, for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery unless such suit or action shall be commenced within the term of twelve months next after such loss or damage shall occur; and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall occur, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

☞ Petroleum, rock, earth, coal, kerosene or carbon oils of any description, whether crude or refined, benzine, benzole, nahptha, camphene, spirit-gas, burning-fluid, turpentine, phosgene, or any other inflammable liquid, are not to be stored, used, kept, or allowed on the above

premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on this policy, excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn and the lamps filled by daylight: otherwise this policy shall be null and void.

☞ Gunpowder, or any other article subject to legal restrictions, it is understood and agreed, are subject to the same restrictions, prohibitions, limitations, and conditions under this policy as the articles mentioned in the section next preceding this.

☞ Fences, privies, and other yard fixtures, also store furniture and fixtures, must be separately and specifically insured, otherwise they are not protected by this policy.

☞ If any property covered by this insurance be damaged by lightning, or the bursting of a boiler, or by explosion from any cause, this company shall not be liable therefor unless fire ensues, and then for the loss by fire only, which shall be determined by the value of the damaged property after the casualty by explosion or lightning.

Provided always, and it is hereby expressly agreed and declared, and the true intent and meaning hereof is, that the said capital stock and funds of the said company shall alone be answerable to the demands thereupon, under this policy; and that no member of the said company shall be subject or liable to any demands against the said company, upon any account or pretence whatsoever, beyond his share of the capital stock or funds of the company, and which share is set opposite his signature to the deed of settlement establishing the said company, or mentioned in some other deed referring thereto, and declaring him to be a member thereof, anything contained in this policy to the contrary notwithstanding.

In witness whereof we (being two of the local directors of the said company) have hereunto set our hands, at New York, this 21st day of May, in the year of our Lord 1870.

37 (Indorsed:) Expires day of , 18 . Premises, . No. . Imperial Fire-Insurance Company, of London. Assets over $8,000,000 in gold. Amount insured, $. Premium, $. Offices: U. S. branch, 40 & 42 Pine st., E. W. Crowell, resident manager, New York. 1 Old Broad st. & 16 Pall Mall, W'm Lyall, managing director, London. Register, . New York Economical Printing Company, 194 Fulton street, N. Y.

38 EXHIBIT B.

THE IMPERIAL FIRE-INSURANCE COMPANY OF LONDON.—OFFICE 40 PINE STREET, NEW YORK.

Policy No. 679575. [Coat-of-arms.] $10,000

LONDON BOARD OF DIRECTORS.—Ashton, Richard James, esq.; Barclay, Thomas George, esq.; Bell, James Christian Clement, esq.; Bevan, Robert Cooper Lee, esq.; Brand, James, esq.; Cave, Charles, esq.; Chapman, Edward Henry, esq.; Davidson, Henry, esq.; Field, George, esq.; Gibb, Thomas Jones, esq.; Gilliat, John Saunders, esq.; Henning, Capt. Alexan., R. N.; Hibbert, George, esq.; Hume, William Burnley, esq.; Hyde, Samuel, esq.; Kirkland, Sir John; Lyall, William, esq.; Marryat, Charles, esq.; Murdoch, James Gordon, esq.; Neilson, Claude, esq.; Newman, Thomas Holdsworth, esq.; Pattison, Frederick, esq.; Rigge, John Sanderson, esq.; Scott, James, esq.; Smith, Martin Tucker, esq.; Twining, Richard, esq.

AUDITORS.—Astell, John Harvey, esq.; Eaton, H. W., esq., M. P.; Farquhar, Horace, esq.; Field, Barclay, esq.; Reid, G. J. Graystone, esq.

LOCAL BOARD OF DIRECTORS.—Archibald, Edward M., esq., chairman; Salomon, David, esq., deputy chairman, 9 West 48th street; Irvin, Richard, esq.—Richard Irvin & Co.; Jaffray, Edward S., esq.—E. S. Jaffray & Co.; Johnston, J. Boorman, esq.—J. Boorman Johnston & Co.; Low, A. A., esq.—A. A. Low & Brothers; Stuart, James, esq.—J. & J. Stuart & Co.

RESIDENT MANAGER.—E. W. Crowell.

ASSISTANT MANAGER.—Joseph B. S't John.

[50 c'ts rev. stamp.]

Whereas American Merchants' Union Express Company paid to the Imperial Fire-Insurance Company the sum of fifteen hundred dollars for insurance from loss or damage by fire, viz, on goods, wares, and merchandise in their care for transportation, while on board cars or other conveyances, including water and stage routes, embracing the entire routes of said company, which routes are designated by red lines or yellow lines on a map furnished by assured, on file in the office of Benson B. Smith, No. 11 Wall st., N. Y. It is agreed, as a condition of this policy, that it is to attach only on the above-mentioned property while actually on board cars or other conveyances, as above described, or while in transit to and from the different places on the routes of said company, as above designated, and while loading and reloading at any point on said routes; and whereas the assured in their contracts with railroads or other companies, associations, or individuals on said routes have agreed to waive all claims on them for damages as common carriers or otherwise, it is understood and agreed that the said companies, associations, or individuals are not to be held liable or accountable by this company for any loss that may occur.

It is a condition of this insurance that there shall be obtained and kept thereon other similar insurance to the amount of at least ninety thousand dollars; and, in case of loss or damage, this policy shall contribute not exceeding the proportion which this policy bears to the full sum of one hundred thousand dollars. It is a further condition of this insurance that no loss is to be paid in case of collision, except fire ensue, and then only for the loss and damage by fire; and that no loss is to be paid arising from petroleum or other explosive oils. Other insurance permitted without notice until required. One year @ 15% from Sept. 26, 1870.

$10,000.	1 y'r @ 15%.	$1,500.00.

Now, be it known that, in consideration of such payment, the capital stock and fund of the said Imperial Fire-Insurance Company shall be subject and liable to pay to the assured, their successors or assigns, all such loss or damage, not exceeding in amount the sum of ten thousand dollars, as shall happen by fire to the property as above specified during one year, to wit, from the twenty-sixth day of September, one thousand eight hundred and seventy (at 12 o'clock at noon) until the twenty-sixth day of September, one thousand eight hundred and seventy-one, (at 12 o'clock at noon,) the said loss or damage to be estimated according to the actual cash value of the property at the time the same shall happen, and to be paid within sixty days after due notice and proof thereof made by the assured, in conformity to the following conditions:

Provided always, and it is hereby declared, that this corporation shall not be liable to make good any loss or damage by fire which may hap-

pen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire, or for loss on or damage to stock, or goods of any kind, which shall or may happen to the same while undergoing any process in or by which the application of fire-heat is necessary; and provided further, that if any other insurance has been or shall hereafter be made upon the said property and not consented to by this company in writing hereon, or if the said property shall be sold or conveyed, or the interest of the parties therein changed, or if this policy shall be assigned without the consent of the company obtained in writing herein, or if the assured shall make any attempt to defraud the company, then, and in every such case, this policy shall be null and void. In case of loss the insured shall not be entitled to demand or recover on this policy any greater proportion of loss or damage sustained to the subject insured than the amount hereby insured shall bear to the whole amount insured (whether the same shall be valid or not) on the said property. And it is agreed and declared to be the true intent and meaning of the parties hereto that, in case the above-mentioned premises are, at any time during the period for which this policy would otherwise continue in force, used for more hazardous purposes than that called for in the original contract of insurance, or if it be vacant and unoccupied, or the hazard otherwise increased, or if it be a manufacturing establishment running in whole or in part over or extra time, or running at night, without special agreement indorsed on this policy, this policy shall be of no force or effect. And it is moreover agreed and declared that this insurance is not intended to apply to or cover any books of account, written securities, deeds, or other evidences of title to property; nor to bonds, bills, notes, or other evidences of debt; nor to money or bullion; and that casts, curiosities, engravings, jewelry, jewels, medals, models, musical and scientific instruments, (piano-fortes in dwelling-houses excepted,) paintings, patterns, plates, precious stones, printed music, prints, sculpture, statuary, and watches are not deemed to be included in any insurance, unless particularly specified in writing in the policy. In case of loss not more than fifty dollars will be allowed on any one picture or print unless a valued catalogue shall have been previously deposited in the office.

1. Applications for insurance on property must be in writing and must specify the construction and materials of the building to be insured, or containing property to be insured; by whom occupied; whether as a private dwelling or how otherwise; its situation with respect to contiguous buildings and their construction and materials, and whether any manufacturing is carried on within or about it. And in relation to the insurance of goods and merchandise the application must state whether or not they are of the description denominated hazardous, extra hazardous, or specially hazardous; and such survey and description shall be taken and deemed to be a part and portion of the policy issued thereon, and a warranty on the part of the insured.

2. If any person effecting insurance in this company shall make any misrepresentation or concealment touching the risk to be assumed, or if, during the existence of this policy, or any renewal thereof, the risk shall be increased by any means by the occupation of the premises for more hazardous purposes than are permitted by this policy, or if the insured, at or before the taking of any renewal, shall fail to notify the company of any increase of the hazard, whether within or without the premises, and have the same indorsed hereon, this policy shall be void. Every renewal shall be deemed to be made upon the faith of the representation

on which the original policy was granted, unless superseded by a new description of the risk.

3. This insurance may be terminated at any time, at the request of the insured, in which case the company may retain the customary short rates for the time the policy has been in force. The insurance may also be at any time terminated at the option of the company, on giving notice to that effect and by paying a ratable proportion of the premium for the unexpired term of the policy, on demand.

4. If the property to be insured be held in trust or on commission or be a leasehold, or other interest not absolute, it must be so represented to the company and expressed in the policy in writing, otherwise the insurance as to such property shall be void; and in case of loss the names of the respective owners shall be set forth in the preliminary proofs of such loss, with their respective interests.

The clause "held in trust or on commission, or sold but not delivered," covers only the property of the assured, or upon property in which the same has an interest in for commissions or other charges, (and if for commissions, advances, or other charges, only to the extent of the same,) or upon property held for others which the assured has agreed in writing to protect by insurance, and is responsible for the same, or for property that has been duly entered upon the book or books of the assured in the name of a purchaser and not delivered.

Goods held on storage must be separately and specifically insured.

5. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium.

6. Re-insurance for any other insurance company to be on the basis of joint liability with said company; and, in the event of loss, the company to pay pro rata at and in the same time and manner as the company re-insured. If claim shall be made against this company by a mortgagee holding this policy as collateral security, and this company shall pay the same and claim that as to the mortgagor or owner no liability existed, this company shall at once be legally subrogated to all the rights of the mortgagee under all the securities held as collateral to the mortgage debt, to the extent of such payment, or, at its option, may pay the mortgagee the whole principal due or to become due on the mortgage, with interest, and shall receive therefor a full assignment and transfer of the same, and all other securities held as collateral to the mortgage debt.

And whenever this company shall pay any loss, the assured agrees to assign over all his rights to recover satisfaction therefor from any other person or persons, town or other corporation, or to prosecute therefor at the charge and for the account of the company, if requested.

7. If at the happening of any fire the insured shall have insurance under a floating policy or policies, not specific, but covering goods generally, in various places not designated, and yet within limits which include the premises or property herein insured, such policy, as between the insured and this company, shall be considered as co-insurance with this policy, anything in the floating policy to the contrary notwithstanding.

8. In case of claim for loss or damage on a policy assigned, where there is no actual sale or transfer of the property insured, proofs of loss shall be made by the insured, in conformity with the conditions of this policy, in the same manner as if no assignment had been made; otherwise this policy shall be void and of no force or effect whatever, and all liability on the part of this company shall cease.

9. It is mutually understood that there can be no abandonment to the insurers of the subject insured in case of loss or damage by fire.

10. Persons sustaining loss or damage by fire shall forthwith give notice thereof in writing to the company or its agent, and, as soon after as possible, they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed with their own hands; and they shall accompany the same with their oath or affirmation, declaring the said account to be true and just; showing also the ownership of the property insured; what other insurance, if any, existed on the same property, and give a copy of the written portion of the policy of each company; what was the whole cash value of the subject insured; what was their interest therein; in what general manner (as to trade, manufactory, merchandise, or otherwise) the building insured or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated, so far as they know or believe; they shall also produce a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds, most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferers, stating that he has examined the circumstances attending the fire, loss, or damage alleged; that he is acquainted with the character and circumstances of the insured or claimants, and that he verily believes that he, she, or they have, by misfortune, and without fraud or evil practice, sustained loss and damage on the subject insured to the amount which such magistrate, notary public, or commissioner of deeds shall certify. The assured shall, if required, submit to an examination or examinations, under oath, by any person appointed by the company, and subscribe to such examination when reduced to writing.

When merchandise or other personal property is partially damaged, the insured shall forthwith cause the same to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kind, separating the damaged from the undamaged, and shall cause a list or inventory to be made and furnished to the company of the whole, naming the quantity and cost of each. In case differences shall arise concerning the amount of loss, the amount of sound value and of damage shall then be ascertained by the examination and appraisal of each article by disinterested appraisers, mutually agreed upon, one half of the appraisers' fees to be paid by the insurers; and the assured shall, if required, submit to an examination, under oath, by the agent or attorney of the company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, or to their claim thereupon, and subscribe to such examination, the same being reduced to writing; and, whenever required in writing, the insured or persons claiming shall produce and exhibit his books of account and other vouchers to the insurers or their agents, at the office of this company, in support of his claim, and permit extracts and copies thereof to be made; and shall also produce certified copies of any bills or invoices of property destroyed or damaged, the originals of which may have been lost, mislaid, or destroyed; and shall also exhibit to any persons named by the company, and shall permit to be examined by them, any property damaged on which any loss is claimed, or any property saved which was insured by this policy; and until such proofs, declarations, and certificates are produced, and such appraisals and examinations of property permitted by the claimant, the loss shall not be payable.

All fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy.

11. In case of any loss or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and quality, or to take the goods at their appraised value, or to rebuild or repair the building or buildings, within a reasonable time, giving notice of their intention so to do within thirty days after having received the preliminary proofs of loss required by the tenth article of these conditions; and the assured shall, if required, furnish plans and specifications of the building or other property destroyed. In case differences shall arise concerning the amount of any loss or damage by fire, the matter shall, at the written request of either party, be submitted to the judgment of arbitrators, indifferently chosen, whose award in writing, as to the amount of such loss and damage, shall be binding on the parties; but such award shall not determine any question as to the liability of this company under this policy.

The cash value destroyed or damaged by fire shall in no case exceed what would be the cost to the assured at the time of the fire of replacing the same; and in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of replacing shall be made, to ascertain the actual cash value.

12. This company will not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stone or brick chimney, or in consequence of neglect or of deviation from the laws or regulations of police made to prevent accidents from fire, in places where laws and regulations on this subject exist.

13. It is furthermore hereby expressly provided that no suit or action of any kind against said company, for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery unless such suit or action shall be commenced within the term of twelve months next after such loss or damage shall occur; and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall occur, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

☞ Petroleum, rock, earth, coal, kerosene, or carbon oils of any description, whether crude or refined, benzine, benzole, naphtha, camphene, spirit gas, burning fluid, turpentine, phosgene, or any other inflammable liquid, are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on this policy, excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn and the lamps filled by day-light: otherwise this policy shall be null and void.

☞ Gunpowder, or any other article subject to legal restrictions, it is understood and agreed, are subject to the same restrictions, prohibitions, limitations, and conditions under this policy as the articles mentioned in the section next preceding this.

☞ Fences, privies, and other yard fixtures, also store furniture and fixtures, must be separately and specifically insured, otherwise they are not protected by this policy.

☞ If any property covered by this insurance be damaged by lightning, or the bursting of a boiler, or by explosion from any cause, this company shall not be liable therefor unless fire ensues, and then for the loss by fire only, which shall be determined by the value of the damaged property after the casualty by explosion or lightning.

Provided always, and it is hereby expressly agreed and declared, and the true intent and meaning hereof is, that the said capital stock and funds of the said company shall alone be answerable to the demands thereupon, under this policy; and that no member of the said company shall be subject or liable to any demands against the said company, upon any account or pretence whatsoever, beyond his share of the capital stock or funds of the company, and which share is set opposite his signature to the deed of settlement establishing the said company, or mentioned in some other deed referring thereto and declaring him to be a member thereof, anything contained in this policy to the contrary notwithstanding.

In witness whereof we (being two of the local directors of the said company) have hereunto set our hands, at New York, this 27th day of Sept., in the year of our Lord 1870.

39 (Indorsed:) Expires day of 18 . Premises, No. . Imperial Fire-Insurance Company of London. Assets, over $8,000,000 in gold. Amount insured, $: premium, $. Offices: U. S. branch, 40 & 42 Pine st., E. W. Crowell, resident manager, New York; 1 Old Broad st. & 16 Pall Mall, W'm Lyall, managing director, London. Register, . New York Economical Printing Company, 194 Fulton street, N. Y.

40 And the said The Imperial Fire-Insurance Company of London, defendants in this suit, by N. B. Hoxie, esq., their attorney, come, and defend the wrong and injury, when, &c.

UNITED STATES CIRCUIT COURT,
Southern District of New York:

WILLIAM G. FARGO, AS PRESIDENT OF THE American Merchants' Union Express Company,
against
THE IMPERIAL FIRE-INSURANCE COMPANY of London.

The answer of the Imperial Fire-Insurance Company, the defendant above named, to the declaration of the plaintiff in the above-entitled action.

First. This defendant admits that the American Merchants' Union Express Company were at the times in said declaration mentioned and now are a joint-stock company or association, and that William G. Fargo was and is president thereof, as in said declaration alleged,

41 and that at the times in said declaration mentioned said company were and are engaged in the business of transporting and forwarding goods and merchandise, as common carriers, as in said declaration alleged.

Second. This defendant admits that at the times in said declaration mentioned this defendant was, and now is, an incorporation organized and carrying on business as in said declaration alleged.

Third. This defendant admits that on or about the 21st day of May, 1872, at the city of New York, for the consideration therein mentioned, this defendant made and issued to the said American Merchants' Union Express Company a policy of insurance, a copy whereof is annexed to said declaration, and marked "Exhibit A."

Fourth. Except as to the other policy of this defendant for the sum

of seven thousand one hundred and seventy-two $\frac{71}{100}$ dollars in said declaration mentioned, this defendant has not knowledge or information sufficient to form a belief whether or not there was at the time of the fire alleged in said declaration, upon the goods, wares, and
42 merchandise in the care of the said express company for transportation, other similar insurance to the amount or by the policies in said declaration alleged.

Fifth. This defendant admits that the said policy of insurance of this defendant, of which a copy is annexed to said declaration, and marked "Exhibit A," had, previous to the alleged loss in said declaration mentioned, been reduced in amount by the payment of certain losses to the sum of fourteen thousand three hundred and forty-five $\frac{41}{100}$ dollars.

Sixth. This defendant admits that the said American Merchants' Union Express Company has demanded payment of the sum of three thousand and eighteen $\frac{71}{100}$ dollars claimed by said express company under said policy and that no part of the same has been paid.

Seventh. This defendant admits that on or about the 27th day of September, 1870, at the city of New York, for this consideration therein mentioned, this defendant made and issued to the said American Merchants' Union Express Company a policy of insurance, a copy whereof is annexed to said declaration and marked "Exhibit B."

42½ Eighth. Excepting as to the other policy of this defendant, the same being the policy firstly mentioned in said declaration, this defendant has not knowledge or information sufficient to form a belief whether or not there was at the time of the fire alleged in said declaration, upon the goods, wares, and merchandise in the care of said express company for transportation, other similar insurance to the amount or by the policies in said declaration alleged.

Ninth. This defendant admits that the said policy of insurance of this defendant, of which a copy is annexed to said declaration and marked "Exhibit B," had previous to the alleged loss in said declaration mentioned been reduced in amount by the payment of certain losses to the amount or sum of seven thousand one hundred and seventy-two $\frac{71}{100}$ dollars.

Tenth. This defendant admits that the said American Merchants' Union Express Company has demanded payment of this defendant of the sum of fifteen hundred and nine $\frac{17}{100}$ dollars, claimed by said express company under said policy lastly above mentioned, and that no part
43 of the same has been paid.

Eleventh. This defendant specifically denies each and every allegation in said declaration contained not hereinbefore expressly admitted.

Twelfth. This defendant avers that any and all loss or damage which occurred or was sustained by said American Merchants' Union Express Company by or in consequence of the alleged destruction by fire of goods, wares, and merchandise, in the care of said express company for transportation, in said declaration mentioned, arose from petroleum or other explosive oils.

Thirteenth. This defendant avers that this suit or action was commenced long after the expiration of twelve months next after the loss alleged in said declaration, and for and on account of which claims were made by said express company against this defendant upon the two policies of insurance in said declaration mentioned, occurred.

Wherefore this defendant demands judgment against the plaintiff in this action.

N. B. HOXIE,
Defendant's Attorney.

44 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Edgar W. Crowell, being duly sworn, saith: That he is resident manager in the United States of the Imperial Fire-Insurance Company of London, the defendant above named. That the foregoing answer is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

That all the material allegations stated therein are within the personal knowledge of deponent. That the knowledge and grounds of belief of this deponent are derived from the issuing by this deponent of the policies of insurance mentioned in said answer and his charge of the business of said defendant, statements made to deponent by other persons in reference to the circumstances attending the fire upon which the claims of the plaintiff are founded, or claimed to be founded, and

the service upon deponent, as such resident manager, of the sum-
45 mons by which this action was commenced.

That no officer of the defendant other than deponent is within the State of New York.

EDGAR W. CROWELL.

Sworn before me this 8th day of January, 1873.

AUG. R. McMAHON,
Notary Public, New York Co.

46 (Indorsed:) U. S. circuit court, southern dist. of New York. William G. Fargo, as president, &c., against the Imperial Fire-Insurance Company of London. N. B. Hoxie, def't's att'y, 67 William st., N. Y. To R. G. Beardslee, esq., pl'ff's att'y. Rec'd Jan'y 9, 1873.

And it is suggested to the court now here that heretofore, and on the 25 day of February, 1873, a rule was duly entered herein substi-
47 tuting Beardslee & Cole in the place of Van Vorst & Beardslee, as attorneys for the plaintiffs herein.

Therefore the issue above joined is ordered by the said court to be *be* tried at the term of the said court appointed to be held at the city of New York on the third Monday of October, in the year 1874, to wit, on the 5 & 6 days of January, 1875, being as yet of the said term. At which day and place aforesaid came as well the above-named plaintiffs as the above-named defendants, by their respective attorneys aforesaid, and the jurors of the jury summoned to try the said issue being called, also came, who, to speak the truth of the matters aforesaid being chosen, tried, and sworn, say, upon their oath, that they find a verdict for the plaintiffs, and against the defendants, in manner and form as the said plaintiffs have above complained against them, and they assess the damages of the said plaintiffs by reason of the premises over and above his costs and charges by him about his suit in this behalf expended to $5,396.54, and for those costs and charges to $93.85.

Therefore it is considered that the plaintiffs do recover against
48 the said defendants their said damages, costs, and charges by the jurors aforesaid in form aforesaid assessed, and also for their costs and charges by the court here adjudged of increase to the plaintiffs with their assent, and interest on the verdict, which said damages, costs, & interest amount to the sum of $5,490.39.

And said defendants, in mercy, &c.

Judgment signed this 19th February, 1875.

R. E. STILWELL,
Deputy Clerk.

49 (Indorsed:) Circuit court of the U. S., southern dist. of N. Y. William G. Fargo, as pres't of the American Merchants' Union Express Company, agst. The Imperial Fire-Insurance Company of London. Judgment-roll. Beardslee & Cole, pl'ff's att'ys, 106 Broadway, N. Y. Filed Feb'y 19, 1875.

50 *Bill of exceptions.*

In the circuit court of the United States. Second circuit, southern district of New York.

WILLIAM G. FARGO, AS PRESIDENT OF THE American Merchants' Union Express Company
against
THE IMPERIAL FIRE-INSURANCE COMPANY of London.

This action came on for trial upon the issues joined therein, at a stated term of the circuit court of the United States for the southern district of New York, in the city of New York, in said district, on the fifth day of January, A. D. 1875, before the Hon. William J. Wallace, judge of the district court of the United States for the northern district of New York, and a jury duly empaneled and sworn therein.

The plaintiff, to maintain the issue on his part, read in evidence the two several policies of insurance of the defendant, copies whereof in full are set forth and contained in the declaration in this action.

51 The plaintiff then read in evidence the following agreed statement of facts:

U. S. circuit court.

WILLIAM G. FARGO, AS PRESIDENT &C.,
ag'st
THE IMPERIAL FIRE-INSURANCE COMPANY.

The following facts are agreed upon and admitted:

The New York Central and Hudson River Railroad is now, and was during the whole of the years 1870 and 1871, one of the routes of the plaintiff herein laid down on the map referred to in the policies of insurance issued by the defendant and set forth in the declaration herein.

On February 6, 1871, an oil freight-train of said railroad was on its way from the city of Albany to the city of New York, on the westerly track of said railroad. Such train was composed mainly of oil-cars, so called, the same being trucks or platforms, having upon them, respectively, two large wooden tanks, with iron hoops; one of said tanks at each end of said trucks or platforms, and each tank containing several thousand gallons of petroleum.

52 By the breaking of an axle, one of said oil-cars was thrown from or left the said westerly track, and so left and situated that it stood across the easterly track of said railroad upon the bridge next south of the tunnel at New Hamburgh.

While said oil-car was so situated, an express passenger-train of said railroad company, composed of locomotive and tender, baggage-car, express freight car, five sleeping-cars, and one ordinary passenger-car, connected in the order stated, was on its way from said city of New York to said city of Albany, upon said easterly track of said railroad. In said express freight-car was a large quantity of merchandise in the possession of the plaintiffs and in course of transportation by them.

Said express passenger-train was proceeding at a high rate of speed, and while so proceeding, at or about the hour of ten o'clock in the evening of said sixth day of February, 1871, struck one of the said oil-tanks upon said oil-car standing across said easterly track of said railroad upon said bridge, as before mentioned.

Immediately upon said collision the said petroleum in said tank
53 so struck was in some way ignited and burst into flames, which surrounded and enveloped the locomotive and tender, baggage-car, express freight-car, and first, second, and third sleeping-cars of said express passenger-train, and consumed the bridge, the baggage-car and its contents, the express freight-car and most of its contents, and the first, second, and third sleeping-cars, with many of the passengers therein.

In consequence of the immense mass and rapid and irresistible spread and progress of such flames, it was impossible to save any of said cars, property, or lives so destroyed.

There was no petroleum or other explosive oil in or upon either of said trains in the possession or under the control of the plaintiffs.

The value of the said merchandise in said express freight-car in the possession of the plaintiffs as aforesaid, and destroyed with said car as aforesaid, was twenty-two thousand five hundred and twelve $\frac{55}{100}$ dollars.

There were upon the property in question at the time of said destruction thereof, besides the insurances made by the defendants, the several other insurances set forth in the declaration herein.

54 Either party to this action may introduce evidence of further or other facts not in conflict or inconsistent with the facts hereinbefore stated.

Nothing herein contained is to be construed as a shifting of the burden of proof as to the origin or cause of the fire herein mentioned.

This action was originally commenced in the court of common pleas for the city and county of New York by the service of a summons upon the defendant on the 11th day of April, 1872.

Dated New York, December 15, 1874.

BEARDSLEE & COLE,
Pl'ff's Att'ys.

N. B. HOXIE,
Def't's Att'y.

The plaintiff then read in evidence a notice and an acknowledgement of receipt thereof by defendant, as follows:

AMERICAN MERCHANTS' UNION EXPRESS COMPANY.

General offices, No. 113 Broadway, (up-stairs).

NEW YORK, *February* 7, 1871.

Received of the American Merchants' Union Express Company notice of the burning of a car on the Hudson River Railroad near New Hamburgh, on the night of February 6, 1871, by which goods in
55 transit by this company were wholly destroyed by fire.

Hartford Fire-Ins. Co. BIGELOW & COITS, *Ag'ts.*
Manufacturers " " BIGELOW & COITS, "
G't Western Ins. Co. J. F. HANFORD, *Ag't F. W. B.*
Occidental, S. F. GLOVER & GORDON, *Ag'ts for Hall.*
Liv., Lon. & Globe Ins. Co. J. E. PULSFORD, *Ass't Sec'y.*
Imperial Fire-Ins. Co. E. W. CROWELL, *R. M.*
Beekman Fire-Ins. Co. C. A. BETTS, *Ag't.*

Upon the call of the plaintiff, the defendant produced and the plaintiff read in evidence two several papers purporting to be proofs of loss, delivered to the defendant November 29, 1871.

They are as follows:

IMPERIAL INSURANCE COMPANY OF LONDON.

UNITED STATES OF AMERICA,
State of New York, County of New York, ss:

Be it known that on this 27th day of November, A. D. 1871, before me, Cha's S. Newcomb, a notary public, duly commissioned and sworn, and residing in the city of New York, in the county and State aforesaid, personally appeared Charles G. Clark, ass't sup't of the American Merchants' Union Express Company who, being duly sworn, depose' and say, and each for himself says, that the following statement, and the papers therein referred to and signed with his own hand, contains a particular, just, and true account of the loss of the American Merchants' Union Exp. Co., in the words and figures following, to wit:

56

I. That on the twentieth day of May, A. D. 1870, the Imperial Insurance Company of London, by their policy of insurance numbered 674329, issued by their agent at New York, in the State of New York, did insure the party herein and therein named against loss or damage by fire, to the amount of twenty thousand dollars, which amount is reduced by losses paid on fires previous to Feb'y 6, 1871, to $14,355.41, which is present value of policy, for the term of one year from the 20th day of May, A. D. 1870, to the 20th day of May, A. D. 1871, at noon; which said policy was subsequently continued in force by renewal until the day of , A. D. 18 , at noon.

II. That in addition to the amount covered by said policy of said company there was other insurance made thereon to the amount of ninety-two thousand six hundred and twenty-nine $\frac{65}{100}$ dollars as specified in the accompanying schedule showing the name of each company and the written portions of each policy, besides which there was no other insurance thereon.

57

III. That the actual cash value of the property so insured amounted to the sum of $22,512.$\frac{55}{100}$ dollars and upwards at the time immediately preceding the fire, as will appear by the annexed schedule showing a full and accurate description of each kind of property and the value of the same, with the damage or loss on each stated separately.

IV. That the property insured belonged to the American Merchants' Union Express Company, in their capacity of express forwarders.

V. That the building insured or containing the property destroyed or damaged was occupied in its several parts by the parties hereinafter named, and for the following purposes, to wit: and for no other purposes whatever.

VI. That on the 6th day of February, A. D. 1871, a fire occurred by which the property insured was injured or destroyed to the amount of twenty-two thousand five hundred and twelve $\frac{55}{100}$ dollars, as set forth in the statement and the several schedules and papers hereto annexed, which the deponent declares to be a just, true, and faithful account of the loss of the Am. M. U. Exp. Co., as far as he has been able to ascertain the same.

58

And the insured claim of the Imperial Insurance Company the sum of $3,018.$\frac{94}{100}$, as follows:

$3,018.$\frac{94}{100}$ on goods in transit,

Total amount claimed, $3,018.$\frac{94}{100}$.

VII. That the fire originated from accidental causes; and said deponent further declare' that the said fire did not originate by any act, design or procurement on the part of the Am. M. U. Exp. Co., or its agents, or in consequence of any fraud or evil practice done or suffered by them, and that nothing has been done by or with their privity or consent to violate the conditions of insurance or render void the policy aforesaid.

Witness my hand at New York, in the county of New York and State of New York, this 27th day of November, A. D. 1871.

CHA'S G. CLARK.

Subscribed and sworn to before me this 27th day of November, A. D. 1871.

CHA'S S. NEWCOMB,
Notary Public, New York.

59 *Schedule of insurance.*

Insurance Co's.	No. of policy.	Date.	Amount present value.
Mech. & Traders'	76,692	Feb. 20, '70	3,421 72
Imperial	674,329	May 20, '70	14,345 21
Occidental	1,714	" 31, "	7,035 22
Imperial	679,575	Sept. 26, "	7,172 71
Hartford	29,841	Dec. 1, "	10,000 00
Liv., Lon. & Globe	1,278,218	" " "	30,000 00
G't Western	6,147	" " "	10,000 00
Beekman	53,541	" " "	10,000 00
Franklin	38,234	" " "	5,000 00
Occidental	2,266	Jan. 27, '71	5,000 00
Manufacturers'	87,313	" " "	5,000 00
			106,975 06
			14,345 41
			$92,629 65

IMPERIAL INSURANCE COMPANY OF LONDON.

UNITED STATES OF AMERICA,
State of New York, County of New York, ss:

Be it known that on this 27th day of November, 1871, before me, Cha's S. Newcomb, a notary public, duly commissioned and sworn, and residing in the city of New York, in the county and State aforesaid, personally appeared Cha's G. Clark, ass't sup't of the American Merchants' Union Express Company, who, being duly sworn, deposes
60 and says that the following statement, and the papers referred to and signed with his own hand, contains a particular, just and true account of the loss in the words and figures following, to wit:

I. That on the twenty-sixth day of September, A. D. 1870, the Imperial Insurance Company of London, by their policy of insurance numbered 679575, issued by their agent at New York, in the State of New York, did insure the party herein and therein named against loss or damage by fire to the amount of ten thousand dollars, which amount has been reduced by losses paid on fires previous to Feb. 6, 1871, to $7,172\frac{71}{100}$, which is the present value of the policy, for the term of one year from the 26th day of September, A. D. 1870, to the 26th day of

September, A. D. 1871, at noon; which said policy was subsequently continued in force by renewal until the day of , A. D. 18 , at noon.

II. That in addition to the amount covered by said policy of said company there was other insurance made thereon to the amount of ninety-nine thousand eight hundred and two $\frac{35}{100}$ dollars as specified in the accompanying schedule showing the name of each company
61 and the written portions of each policy, besides which there was no other insurance thereon.

III. That the actual cash value of the property so insured amounted to the sum of $22,512$\frac{55}{100}$ & upwards at the time immediately preceding the fire, as will appear by the annexed schedule showing a full and accurate description of each kind of property and the value of the same, with the damage or loss on each stated separately.

IV. That the property insured belonged to the American Merchants' Union Express Company, in its capacity of express *for* forwarder.

V. That the building insured or containing the property destroyed or damaged was occupied in its several parts by the parties hereinafter named and for the following purposes, to wit: and for no other purposes whatever.

VI. That on the sixth day of February, A. D. 1871, a fire occurred by which the property insured was injured or destroyed to the amount of twenty-two thousand five hundred twelve $\frac{55}{100}$ dollars, as set forth in the statement and the several schedules and papers hereto annexed,
62 which the deponent declares to be a just, true, and faithful account of the loss of the American Merchants' Union Express Company as far as he has been able to ascertain the same.

And the insured claim of the Imperial Insurance Company the sum of $1,509.47, as follows: $1,509.47 on goods in transit; $1,509.47 total amount claimed.

VII. That the fire originated from accidental causes; and the said deponent further declare' that the said fire did not originate by any act, design, or procurement on the part of the Am. M. U. Exp. Co. or its agents, or in consequence of any fraud or evil practice done or suffered by them, and that nothing has been done by or with their privity or consent to violate the conditions of insurance or render void the policy aforesaid.

Witness my hand at New York, in the county of New York and State of New York, this 27th day of November, A. D. 1871.

CHA'S G. CLARK.

Subscribed and sworn to before me this 27th day of November, A. D. 1871.

CHA'S S. NEWCOMB,
Notary Public, New York.

Schedule of insurance.

63 Insurance Co.	No. of policy.	Date.	Amount present value.
Mech. & Traders'	76,692	Feb. 20, '70	3,421 72
Imperial	674,329	May " "	14,345 41
Occidental	1,714	" 31, "	7,035 22
Imperial	679,575	Sept. 26, '70	7,172 71
Hartford	29,841	Dec. 1, "	10,000 00
Liv., Lon. & Globe	1,278,218	" " "	30,000 00
G't Western	6,147	" " "	10,000
Beekman	53,541	" " "	10,000
Franklin	38,234	" " "	5,000
Occidental	2,266	Jan. 27, '71	5,000
Manufacturers'	87,313	" " "	5,000
			$106,975 06
			7,172 71
			$99,802 35

The plaintiff then read in evidence a letter of E. W. Crowell, resident manager of defendant, to plaintiff, January 29, 1872. It is as follows:

UNITED STATES BRANCH IMPERIAL FIRE-INSURANCE COMPANY,

No.'s 40 & 42 Pine Street.

NEW YORK, *Jan'y 29th*, 1872.

AMERICAN MERCHANTS' UNION EXPRESS CO., *New York:*

GENT'N: We have to notify you that the proofs of loss under policies 674329 & 679575, by fire Feb'y 6, 1871, at New Hamburgh, are deficient in at least one particular, the origin and cause of the fire, and we therefore object to the proofs you have rendered us.

64 Yours, respectfully,

E. W. CROWELL,
Resident Manager.

Upon the call of the plaintiff, the defendant produced and the plaintiff read in evidence two several other papers purporting to be proofs of loss delivered to the defendant Feb'y 8, 1872. They are as follows:

Corrected proofs of loss.

To the Imperial Insurance Company of London:

STATE OF NEW YORK,
County of do., city of do., ss:

Be it known that on this fifth day of Feb'y, A. D. 1872, before me, Cha's S. Newcomb, a notary public, legally qualified, and residing in the city of New York, in the county and State of New York, personally appeared Cha's G. Clark, ass't sup't of the American M. U. Express Company, who, being duly sworn according to law, declare under oath that the Imperial Insurance Company of London, through its agency at New York, did, on the 26th day of Sept., A. D. 1870, issue
65 to the American M. U. Express Company their policy of insurance No. 679575, the written body of which, with its immediate context, is as below specified, said insurance terminating on the 26th day of Sept., 1871, at noon.

No. 679575. The Imperial Insurance Company of London do hereby insure the American M. U. Express Comp'y against loss or damage by fire to the amount of ten thousand dollars on "goods in transit," which policy has been reduced by payment on previous fire to $7,172.71, which is its present value.

Which said policy was subsequently continued in force by renewal until the day of A. 186 , at noon.

That in addition to the amount covered by said policy of said company there was other insurance made thereon to the amount of $99,802.35 dollars, as particularly specified in the accompanying schedule marked, besides which there was no insurance thereon.

That on the 6th day of February, A. D. 1871, a fire occurred, by which the insured was damaged to the amount of $22,512.55 dollars, as set forth in the statements and the several schedules and papers hereunto annexed, forming a part of this proof of loss, which this depo-
66 nent', declare' to be a just, true, and faithful account of the loss thereon and the circumstances concerning said loss.

That the actual cash value of the so insured, at the time immediately preceding the fire, was twenty-two thousand five hundred twelve $\frac{55}{100}$ dollars and upwards, as will appear by the annexed statement and certificate marked "Schedule ," duly versified under oath, being a full and accurate description of all the property so insured, as well as the value of the same, with the damage thereto.

That the property insured, consisting of merchandise, &c., in transit, belonged solely to the American M. U. Express Company, in their capacity of express forwarders, and had so belonged since the day of A. D. 186 , and there was no other party interested therein.

That the building insured was occupied in its several parts by the parties hereinafter named, and for the following purposes only, to wit, and for no other purpose whatever.

That the fire originated from a collision near the New Hamburgh tunnel, between the 8 p. m. northward-bound train and a southward-bound train on the Hudson River Railroad, on the evening of the sixth
67 of February, 1871; and the said deponent further declare' that the said fire did not originate by any act, design, or procurement on his part, nor on the part of any one having any interest in the property insured or in the said policy of insurance, nor in consequence of any fraud or evil practice done or suffered by him, and that nothing has been done by or with his privity or consent to violate the conditions of insurance or render void the policy aforesaid, and that he will furnish, whenever required by said Imperial Insurance Company, full particulars exhibiting the construction of the building, including its dimensions and condition at the time of said fire, and such additional information concerning said insured property, the damage thereto, and the insurance thereon, as well by means of plans and specifications, books of account, and other vouchers furnished, as by replies to interrogatories made, as shall be required by said company.

And the insured claim of the Imperial Insurance Company, by reason of said loss, damage, and policy of insurance, the sum of dollars as follows: $1,509.47 on goods in transit.

CHA'S G. CLARK.

Subscribed and sworn to before me this 8th day of Feb'y, 1872.

68 CHA'S S. NEWCOMB,
Notary Public, New York.

Schedule of insurance.

	No. of policy.	Date of policy.	Amt.	Less prev. losses.	Present value.
Mech. & Traders'..	76,692	Feb. 20, '70	5,000	1,578 28+	3,421 72
Imperial	674,329	May 20, "	20,000	5,654 59+	14,345 41
Occidental	1,714	" 21, "	10,000	2,964 78+	7,035 22
Imperial	679,575	Sept. 26, "	10,000	2,827 29+	7,172 72
Hartford	29,841	Dec. 1, "	10,000	.....	10,000
Liv., Lon. & Globe.	1,278,218	" " "	30,000	.....	30,000
G't Western.....	6,147	" " "	10,000	.....	10,000
Beekman	53,541	" " "	10,000	.....	10,000
Franklin.....	38,234	" " "	5,000	.....	5,000
Occidental	2,266	Jan. 27, '71	5,000	.....	5,000
Manufacturers'	87,313	" " "	5,000	.....	5,000

Corrected proofs of loss.

To the Imperial Insurance Company of London.

STATE OF NEW YORK,

County of New York, City of do., ss:

Be it known, that on this 5th day of February, A. D. 1872, before me, Cha's S. Newcomb, a notary public, legally qualified, residing in the city of New York, in the county and State aforesaid, personally appeared Cha's G. Clark, ass't superintendent of the American M.
69 U. Express Company, who, being duly sworn according to law, declare' under oath that the Imperial Insurance Company of London, through its agency at New York, did, on the 20th day of May, A. D. 1870, issue to the American M. U. Express Co. their policy of insurance No. 674329, the written body of which, with its immediate context, is as below specified, said insurance terminating on the 20th day of May, 1871, at noon.

No. 674329.—The Imperial Insurance Company of London do hereby insure the American M. U. Express Co. against loss or damage by fire to the amount of twenty thousand dollars on "goods in transit;" which policy has been reduced by payment on previous fire to $14,345 41, which is its present value.

Which said policy was subsequently continued in force, by renewal, until the day of , A. D. 18 , at noon.

That in addition to the amount covered by said policy of said company, there was other insurance made thereon to the amount of $92,629 $\frac{55}{100}$ dollars, as particularly specified in the accompanying schedule, marked , besides which there was no insurance thereon.

That on the sixth day of February, A. D. 1871, a fire occurred,
70 by which the insured was damaged to the amount of $22,512 $\frac{55}{100}$, as set forth in the statements and several schedules and papers hereunto annexed, forming a part of this proof of loss, which this deponent declares to be a just, true, and faithful account of the loss thereon and the circumstances concerning said loss.

That the actual cash value of the property so insured, at the time immediately preceeding the fire, was twenty-two thousand five hundred twelve & $\frac{55}{100}$ dollars, & upwards, as will appear by the annexed statement and certificate marked "Schedule ," duly verified under oath, being a full and accurate description of all the property so insured, as well as the value of the same, with the damage thereto.

That the property insured consisted of merchandise, &c., in transit,

and belonged solely to the American M. U. Express Company in their capacity of express forwarders, and had so belonged since the day of , A. D. 18 ; and there was no other party interested therein.

That the building insured was occupied in its several parts by the parties hereinafter named and for the following purposes only, to
71 wit, and for no other purposes whatever.

That the fire originated from a collision near the New Hamburgh tunnel, between the 8 p. m. northward-bound train and a southward-bound train, on the Hudson River Railroad, on the evening of the sixth of February, 1871: and the said deponent further declares that the said fire did not originate by any act, design, or procurement on his part, nor on the part of any one having any interest in the property insured, or in the said policy of insurance, nor in consequence of any fraud or evil practice done or suffered by him; and that nothing has been done, by or with his privity or consent, to violate the conditions of insurance or render void the policy aforesaid; and that he will furnish, whenever required by said Imperial Insurance Company, full particulars exhibiting the construction of the building, including its dimensions and conditions at the time of said fire, and such additional information concerning said insured property, the damage thereto and the insurance thereon, as well by means of plans and specifications, books of accounts, and other vouchers furnished as by replies to interrogatories made, as shall be required by company.

72 And the insured claim of the Imperial Insurance Company, by reason of said loss, damage, and policy of insurance, the sum of dollars as follows: $3,018\frac{34}{100}$ on goods in transit.

CHA'S G. CLARK.

Subscribed and sworn to before me this 8th day of Feb'y, 1872.

CHA'S S. NEWCOMB,
Notary Public, New York.

Schedule of insurance.

Comp'y.	No. of policy.	Date of policy.	Amt.	Less prev. losses.	Present value.
Mech. & Traders'..	76,692	Feb. 20, '70	5,000	1,578 28	3,421 72
Imperial	674,329	May 20, "	20,000	5,654 59	14,345 41
Occidental	1,714	" 31, "	10,000	2,964 78	7,035 22
Imperial	679,575	Sep. 26, "	10,000	2,827 29	7,172 71
Hartford	29,841	Dec. 1, "	10,000	.....	10,000 00
Liv., Lon. & Globe	1,278,218	" " "	30,000	.....	30,000 00
G't Western	6,147	" " "	10,000	.....	10,000 00
Beekman	53,541	" " "	10,000	.....	10,000 00
Franklin	38,234	" " "	5,000	.....	5,000 00
Occidental	2,266	Jan. 27, '71	5,000	.....	5,000 00
Manufacturers'	87,313	" " "	5,000	.....	5,000 00

It was then admitted and agreed upon that if the plaintiff was entitled to recover in this action, the amount of such recovery would
73 be four thousand five hundred and twenty-eight dollars and forty-eight cents and interest.

The plaintiff then rested his case.

Thereupon the defendant, by its counsel, requested the court to instruct the jury that the evidence introduced by the plaintiff was not sufficient to warrant the jury in finding a verdict in his favor for the reason that the plaintiff had failed to prove that the loss of the property in question did not arise from petroleum or other explosive oils.

The court refused to so instruct the jury. To which ruling and decision of the court, in refusing to give the instruction so requested, the defendant then and there in open court during the trial duly excepted, and prayed that its exception might be allowed by the court and made a part record of the case, which was done and ordered accordingly.

The defendant thereupon read in evidence a letter of the plaintiff to the defendant dated February 13, 1871. It is as follows:

AMERICAN MERCHANTS' UNION EXPRESS CO.

General offices, No. 113 Broadway, (up stairs.)

NEW YORK, *Feb.* 13, 1871.

SEC'Y IMPERIAL INS. CO., *London:*

74 D'R SIR: A portion of the goods contained in car burned at New Hamburgh, N. Y., Feb. 6, 1871, have been recovered from the wreck & are now in charge of our ag't, S. K. Brownson, 61 Hudson st., New York, subject to your inspection and disposition.

Yours, &c.,

C. G. CLARK,
Ass't Sup't.

The defendant then read in evidence a letter from the defendant and other insurance companies, dated February 14, 1871, admitted by the plaintiff to have been sent to and received by the plaintiff on that date. Said letter is as follows:

NEW YORK, *Feb'y 14th*, 1871.

To the AMERICAN MERCHANTS' UNION EXPRESS COMPANY, *New York:*

GENTLEMEN: We have yours of the 13th inst. It was our intention to provide, in our contracts of insurance with your company, for absolute exemption from liability for loss arising from such disasters as that which has occasioned your present claim, and we have no doubt that our policies are sufficient to secure this exemption. Under such
75 circumstances, we have decided that we have nothing to do with any of the property you may recover from the ruins of the fire of the 6th of February at New Hamburgh. We beg to add that if you have any doubts as to the freedom of our policies from liability for losses arising from burning oil, under any and all circumstances, we have to request that our several policies be terminated without delay.

Yours, respectfully,

Occidental Ins. Co., of San Francisco.
GLOVER & GOODRICH,
Res't Managers.

Imperial Fire-Ins. Co.
E. W. CROWELL, *Res't Man.*

Liverpool & London Ins. Co.
ALFRED PELL.

Beekman Ins. Co.
C. H. ROSER, *Sec'y.*

Manufacturers' Ins. Co., Hartford Fire-Ins. Co.
BIGELOW & COIT, *Agents.*

Great Western Ins. Co., of Chicago.
J. F. HANFORD, *Gen. Ag't.*

Mechanics' & Traders' F. Ins. Co.
J. R. LOTTS, *Pres't.*

The defendant then read in evidence a letter from their attorneys of the plaintiff to the defendant, dated February 25, 1871. It is as follows:

AMERICAN MERCHANTS' UNION EXPRESS CO.

General offices, No. 113 Broadway, (upstairs.)

NEW YORK, *Feb'y* 25, 1871. 106 *Broadway, N. Y.*

76 GENT: We are instructed by the directors of The American Merchants' Union Express Company to notify you that the express company will hold you liable for the loss by fire lately occurring on the Hudson River Railroad, at New Hamburgh, under your policy issued to the company.

Yours, &c.,

VAN VORST & BEARDSLEE.

To the IMPERIAL FIRE-INSURANCE COMPANY.

The defendant here rested its case and the testimony was closed on both sides.

The above and foregoing was all the evidence given upon said trial by the respective parties.

And thereupon the defendant by its counsel requested the court to instruct the jury to render a verdict for the defendant upon the following grounds or points, viz:

1. That by the evidence it appeared and was established that the loss for which the action was brought arose from petroleum, and was therefore within the exception mentioned in the policies in suit respectively.

77 2. That by the evidence it appeared and was established that this action was commenced after the expiration of twelve months after the loss or damage in question occurred, and that such delay in commencing the action was, according to the terms and conditions of said policies respectively, a bar to such action.

The court refused to so instruct the jury. To which ruling and decision of the court in refusing to give the instructions so requested the defendant then and there, in open court, during the trial, duly excepted, and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

Thereupon the plaintiff, by his counsel, requested the court to instruct the jury to render a verdict for the plaintiff for the before-mentioned sum of four thousand five hundred and twenty-eight dollars and forty-eight cents, with interest thereon from the April 9, 1871, in all amounting to the sum of five thousand three hundred and ninety-six dollars and fifty-four cents.

78 The court thereupon instructed the jury, as requested by the plaintiff, to render a verdict for said plaintiff for the sum of $5,396.54.

To which ruling and decision of the court, in so instructing the jury to render a verdict for the plaintiff for said sum, the defendant then and there, in open court, duly excepted, and prayed that its exception might be allowed by the court and made a part of the record of the case, which was done and ordered accordingly.

At the time of said last-mentioned ruling and decision and instruction

to the jury, the court orally assigned and stated the grounds or reasons of said ruling and decision and instruction as follows:

Upon the point raised to the action being barred by the limitation of twelve months mentioned in the policies, I have come to the conclusion that I must follow the decision in the case of the Mayor, &c., ag'st the Hamilton Insurance Company in 39 New York Reports; that I cannot distinguish between that case and this one, and that the period of twelve months mentioned in the policies as the time within which the action must be brought, does not begin to run until the cause of action
79 accrues; that is, until the expiration of sixty days after the service of proofs of loss. It has been said that the action could have been commenced immediately after the letter of defendant of February 14, 1871, was received by plaintiff; but the defendant received the preliminary proofs and made objection to them, and that disposes of their right to say that the proofs of loss were waived by them.

The other question in this case is a novel one. This policy seems to have been adapted, by a special printed blank inserted into it, to the peculiar character of the risks that were likely to arise from the transportation of goods by the plaintiff here—the express company. My view of the condition under which it is claimed the plaintiff cannot recover is this: the conditions that "No loss is to be paid in the case of collision except fire ensues, and then only for the loss and damage by fire;" and that "No loss is to be paid arising from petroleum or other explosive oils," are to be read and construed together, and apply to hazards which are peculiarly incident to the business of trans-
80 portation. The parties had in view two hazards incident to the transportation of goods: in the first place collision, and they took pains to express what the law implies, that the company should not be liable in the case of collision unless fire ensued. They wanted to be so very clear on that point that they were not content with the implication of law, but inserted an express provision. In connection with a hazard from collision, they naturally contemplated a hazard from explosion, and I think that they did contemplate such a hazard is evidence from the latter part of this clause, the one especially under consideration, that "No loss is to be paid arising from petroleum or other explosive oils." They treated petroleum as an explosive substance. The loss which they—the insurance company—are exempt from is not one arising from fire, but from explosion, and it seems to me the fair construction to place upon the clause is this, that whereas in case of fire if an explosion occurred which was communicated by the fire, the company might be liable for the whole damage caused by the explosion; in this case they are exempt from all loss except that which is directly communi-
81 cated by fire. If an explosion causes a fire, this is not the hazard which they are exempt from. If a fire causes an explosion, it is.

With my present views, therefore, of the case, I shall have to direct a verdict for the plaintiff for the amount claimed, and interest.

The jury thereupon rendered a verdict for the plaintiff against the defendant for the sum of $5,396.54, five thousand three hundred & ninety-six $\frac{54}{100}$ dollars.

Wherefore, inasmuch as the rulings and decision aforesaid do not appear by the record in the case, the defendant, by its counsel, prayed that the said judge holding said court would set his hand and seal to this bill of exceptions containing the several rulings and decisions so excepted to as aforesaid, and order the same to be made a part of the record in the case; and thereupon, at the request of said counsel for the defendant, and in accordance with the law and practice of this court, the

said judge did then and there in open court, during said term and before the entry of judgment upon the verdict, sign and seal this bill of
82 exceptions and order the same to be made a part of the record of the case.

[L. S.] WM S. WALLACE,
Judge U. S. Dis't Court.

83 (Indorsed:) U. S. circuit court, 2d circuit, southern district of New York. William G. Fargo, as president of the American Merchants' Union Express Company, ag'st the Imperial Fire-Insurance Company of London. Bill of exceptions. N. B. Hoxie, defendant's att'y. Filed, Feb'y 16, 1875.

84 Supreme Court of the United States.

THE IMPERIAL FIRE-INSURANCE COMPANY of London, plaintiff in error,
vs.
WILLIAM G. FARGO, AS PRESIDENT OF THE American Merchants' Union Express Company, defendant in error. } In error.

Of October term, in the year of our Lord one thousand eight hundred and seventy-five.

Afterwards, to wit, on the second Monday of October, in this same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said The Imperial Insurance Company of London, by N. B. Hoxie, its attorney, and says that in the record and proceedings aforesaid, and also in giving the
85 judgment aforesaid, there is manifest error, in this, to wit, that the declaration aforesaid and the matters therein contained are not sufficient in law for the said William G. Fargo, as president of the American Merchants' Union Express Company, to have or maintain his aforesaid action thereof against the said The Imperial Fire-Insurance Company of London; and also there is error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said William G. Fargo, as president of the American Merchants' Union Express Company against the said The Imperial Fire-Insurance Company of London, whereas by the law of the land the said judgment ought to have been given for the said The Imperial Fire-Insurance Company of London against the said William G. Fargo, as president of
86 the American Merchants' Union Express Company. And the said The Imperial Fire-Insurance Company of London prays that the judgment aforesaid, for the errors aforesaid, and for other errors in the said record and proceedings being, may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by occasion of the said judgment, &c.

N. B. HOXIE,
Attorney for Plaintiff in Error.

(Endorsed:) Supreme Court of the United States. The Imperial Fire-Insurance Company of London vs. William G. Fargo, as president of the American Merchants' Union Express Company. Assignment
87 of error. N. B. Hoxie, att'y for pl'ff in error. Filed M'ch 5th, 1875.

88 Supreme Court of the United States.

THE IMPERIAL FIRE-INSURANCE COMPANY of London, plaintiff in error,
ag'st
WILLIAM G. FARGO, AS PRESIDENT OF THE American Merchants' Union Express Company, defendants in error.

And afterwards, to wit, on this second Monday of October, in October term, in the year of our Lord one thousand eight hundred and seventy-four, the said William G. Fargo, as president of the American Merchants' Union Express Company, by Beardslee & Cole, attorneys for said company, freely comes here into court and says that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid, and he prays that the Supreme Court
89 of judicature before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given, may be in all things affirmed, &c.

BEARDSLEE & COLE,
Attorneys for Defendants in Error.

(Endorsed:) U. S. Supreme Court. The Imperial Fire-Insurance Company of London, plaintiff in error, ag'st William G. Fargo, as president of the American Merchants' Union Express Company, joinder in error. Beardslee & Cole, att'ys for def'ts in error, 106 Broadway, N. Y. Filed Ap'l 17, 1875.

90 Circuit court of the United States of America, for the southern district of New York, in the second circuit.

WILLIAM G. FARGO, AS PRESIDENT OF THE American Merchants' Union Express Company,
vs.
THE IMPERIAL FIRE-INSURANCE COMPANY of London.
} Bond for costs.

Know all men by these presents, that we, Edgar W. Crowell, of the city of Brooklyn, State of New York, and James B. Johnston, of the city of New York, are held and firmly bound unto the above-named William G. Fargo, as president of the American Merchants' Union Express Company, in the sum of eleven thousand dollars, to be paid to the said William G. Fargo, as president, &c., for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the second day of March, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas the above named, the Imperial Fire-Insurance Company of London, has prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York.

Now, therefore, the condition of this obligation is such that if the above named, The Imperial Fire-Insurance Company of London, shall prosecute its said writ of error to effect and answer all damages and costs, if it shall fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

E. W. CROWELL. [L. S.]
JA'S B. JOHNSTON. [L. S.]

Sealed and delivered and taken and acknowledged this 2d day of March, 1875, before me.

EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

91 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Edgar W. Crowell and James B. Johnston, sureties in the within bond, being severally duly sworn, do depose and say, and each for himself saith that he is a resident and a freeholder in the State of New York, and that he is worth the sum of eleven thousand dollars over and above all his just debts and liabilities and property exempt by law from levy and sale on execution.

E. W. CROWELL.
JA'S B. JOHNSTON.

Sworn to this 2d day of March, A. D. 1875, before me.

EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

I approve the within bond as to form and sufficiency of the sureties therein.

March 2, 1875.

SAM'L BLATCHFORD,
U. S. District Judge, and one of the Judges of said Circuit Court.

(Indorsed:) Vol. Page U. S. circuit court, southern dist. of New York. William G. Fargo, as president of the American Merchants' Union Express Company, vs. The Imperial Fire-Insurance Company of London. Bond for costs on writ of error. N. B. Hoxie, att'y. Filed this 2d day of March, 1875.

92 United States of America to William G. Fargo, as president of the American Merchants' Union Express Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein the Imperial Fire-Insuranee Company of London is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York,

this second day of March, in the year of our Lord one thousand eight hundred and seventy-five.

SAM'L BLATCHFORD.

93 Due & sufficient service of within citation this day is admitted. Dated New York, March 2d, 1875.

BEARDSLEE & COLE,
Att'ys for Def't in Error.
WILLIAM G. FARGO,
As President, &c.

(Indorsed:) U. S. Supreme Court. The Imperial Fire-Insurance Company of London, plff. in error, vs. William G. Fargo, as president of the American Merchants' Union Express Company, def't in error. Citation. N. B. Hoxie, att'y for pl'ff in error. Filed M'ch 2, 1875.

(Indorsement on cover:) No. 80. The Imperial Fire-Insurance Company of London, plaintiff in error, vs. William G. Fargo, as president of the American Merchants' Union Express Company. S. New York C. C. U. S. Filed 22 June, 1875.

REC. 80—4

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1877.

No. 80.

THE IMPERIAL FIRE INSURANCE COMPANY OF LONDON,

Plaintiff in Error,

vs.

WILLIAM G. FARGO, AS PRESIDENT OF THE AMERICAN MERCHANTS UNION EXPRESS COMPANY,

Defendant in Error.

Brief and Points of Plaintiff in Error.

N. B. HOXIE,

Of Counsel for Plaintiff in Error.

PHILADELPHIA BAR ASSOCIATION

NEW YORK.

Evening Post Steam Presses, 208 Broadway.

1877.

EVENING POST STEAM PRESSES, 208 Broadway, cor. Fulton St., N. Y.

Supreme Court

OF THE UNITED STATES.

THE IMPERIAL FIRE INSURANCE COMPANY OF LONDON,
Plaintiff in Error,

against

WILLIAM G. FARGO, AS PRESIDENT of the American Merchants' Union Express Company,
Defendant in Error.

Brief and Points of Plaintiff in Error.

Abstract or Statement of Case.

The action is founded upon two policies of fire insurance issued by the plaintiff in error to the defendant in error, one in May, 1870, and the other in September, 1870, by which the plaintiff in error insured the defendant in error against loss or damage by fire to goods, wares, and merchandize in care of defendant in error for transportation while on cars or other conveyances.

The policies contain in the description of the risk the following clauses, viz.:

"It is a further condition of this insurance that no "loss is to be paid in case of collision, except fire "ensue, and then only for the loss and damage by "fire. And that no loss is to be paid arising from "petroleum or other explosive oils." (Transcript of Record, pp. 12, 18.)

The policies contain the usual provisions as to payment of loss in sixty days after due notice and proof thereof in conformity with the conditions, and requiring immediate notice of loss, and as soon as possible thereafter a particular account of the loss in form and verified as specified, and among other conditions the following:

"Petroleum, rock, earth, coal, kerosene, or carbon "oils of any description, whether crude or refined; "benzine, benzole, naphtha, camphene, spirit gas, "burning fluid, turpentine, phosgene, or any other in- "flamable liquid are not to be stored, used, kept, or "allowed on the above premises, temporarily or perma- "nently, for sale or otherwise, unless with written "permission endorsed on this policy, excepting the "use of refined coal, kerosene, or other carbon oil for "lights if the same is drawn and the lamps filled by "daylight, otherwise this policy shall be null and void." (Transcript of Record, pp. 16, 22.)

"If any property covered by this insurance be "damaged by lightning, or the bursting of a boiler, or "by explosion from any cause, this company shall not "be liable therefor unless fire ensues, and then for the "loss by fire only which shall be determined by the "value of the damaged property after the casualty by "explosion or lightning." (Transcript of Record, pp. 17, 22.)

"13. It is furthermore hereby expressly provided "that no suit or action of any kind against said com-

"pany for the recovery of any claim upon, under, or "by virtue of this policy shall be sustainable in any "court of law or chancery, unless such suit or action "shall be commenced within the term of twelve months "next after such loss or damage shall occur; and in "case any such suit or action shall be commenced "against said company after the expiration of twelve "months next after such loss or damage shall occur "the lapse of time shall be taken and deemed as con- "clusive evidence against the validity of the claim "thereby so attempted to be enforced." (Transcript "of Record, pp. 16, 22.)

The above are the material parts of said policies.

As to all the questions presented by the bill of exceptions the two policies are alike, and they are set forth *in extenso* at pages 12 to 23 of the Transcript of the Record.

The declaration averred that on February 6, 1871, certain property in the care of defendant in error for transportation on board cars of the New York Central & Hudson River Railroad Company was destroyed by fire which did not happen or arise from any of the causes excepted in said policies, but arose from a collision of two trains upon said railroad." (Transcript of Record, pp. 9, 10.)

That defendant in error duly fulfilled all the conditions of said insurance on their part, and more than sixty days before commencement of action, to wit: on February 8, 1872, gave to plaintiff in error due notice and proof of the fire and loss. (Transcript of Record, pp. 10, 11.)

The plaintiff in error specifically denied the above averments, and, in addition, specially averred:

1. That any and all loss or damage which occurred by the fire in question arose from petroleum or other explosive oils; and

2. That the action was commenced after the expiration of twelve months after the alleged loss occurred.
Transcript of Record, p. 24.

The action was tried at a Circuit Court in the City of New York, before Hon. William J. Wallace, Judge of the United States District Court, Northern District of New York, and a jury, on January 5, 1875.

Upon the trial the defendant in error gave in evidence the following agreed statement of facts:

"The following facts are agreed upon and admitted.

The New York Central & Hudson River Railroad is now, and was during the whole of the years 1870 and 1871, one of the routes of the plaintiff herein laid down upon the map referred to in the policies of insurance issued by the defendant and set forth in the declaration herein.

On February 6, 1871, an oil freight train of said railroad was on its way from the City of Albany to the City of New York, upon the westerly track of said railroad; such train was composed mainly of oil cars, so called, the same being trucks or platforms, having upon them respectively two large wooden tanks with iron hoops, one of said tanks at each end of said trucks or platforms, and each tank containing several thousand gallons of petroleum.

By the breaking of an axle one of said oil cars was thrown from or left the said westerly track, and so left and situated that it stood across the easterly track of said railroad, upon the bridge next south of the tunnel at New Hamburgh.

While said oil car was so situated, an express passenger train of said railroad company, composed of locomotive and tender, baggage car, express freight car, five sleeping cars, and one ordinary passenger car, connected in the order stated, was on its way from said City of New York to said City of Albany, upon said easterly track of said railroad.

In said express freight car was a large quantity of

merchandise, in the possession of the plaintiffs, and in course of transportation by them.

Said express passenger train was proceeding at a high rate of speed, and, while so proceeding, at or about the hour of ten o'clock in the evening of said sixth day of February, 1871, struck one of the said oil tanks upon said oil car, standing across said easterly track of said railroad, upon said bridge, as before mentioned.

Immediately upon said collision, the said petroleum in said tank so struck was in some way ignited, and burst into flames, which surrounded and enveloped the locomotive and tender, baggage car, express freight car, and first, second and third sleeping cars of said express passenger train, and consumed the bridge, the baggage car and its contents, the express freight car and most of its contents, and the first, second and third sleeping cars, with many of the passengers therein.

In consequence of the immense mass and rapid and irresistible spread and progress of such flames it was impossible to save any of said cars, property or lives so destroyed.

There was no petroleum or other explosive oil in or upon either of said trains in the possession or under the control of the plaintiffs.

The value of said merchandise in said express freight car, in the possession of the plaintiffs, as aforesaid, and destroyed with said car, as aforesaid, was twenty-two thousand five hundred and twelve $\frac{55}{100}$ dollars.

There were upon the property in question at the time of said destruction thereof, besides the insurances made by the defendants, the several other insurances set forth in the declaration herein.

Either party to this action may introduce evidence of further or other facts not in conflict or inconsistent with the facts hereinbefore stated.

Nothing herein contained is to be construed as a

shifting of the burden of proof as to the origin or cause of the fire herein mentioned.

This action was originally commenced in the Court of Common Pleas for the City and County of New York by the service of a summons upon the defendant on the 11th day of April, 1872.

Dated New York, December 15, 1874.

"BEARDSLEE & COLE,
Plff's Attys.
"N. B. HOXIE,
Deft's Atty."
Transcript of Record, pp. 26 and 27.

The defendant in error then put in evidence:

A receipt of notice of the fire (p. 27); certain papers claimed to be proofs of loss served on defendant, November 29, 1871 (pp. 28, 30.

A letter of the manager of plaintiff in error to defendant in error, dated January 29, 1872. (Transcript, p. 31).

Certain papers purporting to be proofs of loss served on plaintiff in error, February 8, 1872. (Transcript, pp. 31, 34.)

The proofs of loss served November, 29, 1871, and those served February 8, 1872, were similar except as to the statement as to the origin of the fire.

In those first served the statement is:

"That the fire originated from accidental causes." (Transcript, pp. 29, 30.)

In those last served it is:

"That the fire orignated from a collision near the New Hamburgh tunnel, between the 8 P. M. northward bound train and a southern bound train on the Hudson River Railroad on the evening of the sixth of February, 1871." (Transcript, pp. 32, 34.)

The amount payable by plaintiff in error, if liable, was agreed upon; and

The defendant in error then rested his case.

The plaintiff in error put in evidence a notice from the defendant in error dated February 13, 1871, and plaintiff in error's reply thereto dated February 14, 1871. (Transcript, p. 35.)

And a letter from attorneys of defendant in error to plaintiff in error dated February 25, 1871; and thereupon the testimony was closed. (Transcript, p. 36.)

The plaintiff in error requested the Judge to direct a verdict for the plaintiff in error which he refused, and the plaintiff in error excepted.

The defendant in error requested the Judge to direct a verdict for defendant in error for $\$85{,}396\frac{54}{100}$. The Judge did so direct and the plaintiff in error excepted.

The jury rendered a verdict for defendant in error for $\$85{,}396\frac{54}{100}$. (Transcript, pp. 36, 37.)

A bill of exceptions was duly made, signed, sealed and filed, and a writ of error duly issued to this Court.

The bill of exceptions contains all the evidence given upon the trial by both parties.

The plaintiff in error relies upon and assigns the following errors:

I.—The refusal of the Judge presiding at the trial to instruct the jury to render a verdict for the plaintiff in error upon the following grounds, viz.:

1. That by the evidence it appeared, and was established, that the loss for which the action was brought arose from petroleum, and was therefore within the exception mentioned in the policies in suit respectively.

2. That by the evidence it appeared and was established that this action was commenced after the expiration of twelve months after the loss or damage

in question occurred, and that such delay in commencing the action was, according to the terms and conditions of said policies respectively, a bar to such action.

II.—The direction by the presiding Judge to the jury to render a verdict for the defendant in error.

POINTS.

First.

THE LOSS IN QUESTION AROSE FROM PETROLEUM.

The rules or principles of construction of contracts invoked by the plaintiff in error in support of its contention are fundamental :

Effect is to be given to the entire contract and to each and every part or clause thereof. The contract is to be construed harmoniously and reasonably.

Words must have the same sense in which the parties used them, and the object and intent of the parties are to be ascertained and subserved.

No substantive provision of the contract is to be deemed to have been inserted idly or without motive. Consequently none such should be disregarded or fail to receive its just weight and consideration in construing the contract.

The Court of Appeals of Kentucky says :

" Policies of insurance, though not in all their peculiar provisions and phrases easily intelligible by the insured, should, nevertheless, like all other contracts be construed rationally and consistently according to the subject, object and plain intent. A precisely lit-

eral or inflexibly stringent interpretation against the underwriters would often be inconsistent with public policy, reason and justice, and not required by the wise maxim that ambiguities should be construed most strongly against the framer of the policy."

Manhattan Insurance Company, *vs.* Stein, 5 Bush (Ky.) 652.

The rule is well stated in a recent case in the Court of Appeals of New York, thus:

"In construing contracts, words must have the sense in which the parties understand them. And to understand them as the parties understood them, the nature of the contract, the objects to be attained, and all the circumstances must be considered."

Cushman *v.* U. S. Life Ins. Co., 6 Ins. Law Journal, p. 601 (June, 1877).

The nature of the contract—one of indemnity—one, therefore, *strictissimi juris* (necessarily restricted by various provisions, but for which it would be grossly unequal and inequitable) requires that this special restrictive or exemptive clause palpably necessitated by the recent appearance in the ways of commerce of a destructive article, should be so construed as to give the protection and exemption obviously intended by its use.

The objects to be attained, by the special clause in question, certainly were to afford to the insurer exemption or protection from some risk, casualty, and hazard not otherwise furnished or secured—something more than was by other provisions of the contract already secured.

The susceptibility of petroleum to ignition, and its irresistible destructiveness, when ignited, were well known to the insurers, and in view thereof, and to exempt the company from liability for loss occasioned by such a dreaded agent of destruction, the clause was inserted.

The word "arising," as here used, is to be interpreted or defined as "*resulting from*," "*caused by*," *occasioned by*."

In Hayward *vs.* The Liverpool & London Ins. Co., 3 Keyes, N. Y. Court of Appeals R., p. 458, the clause was:

"This company shall not be liable to make good any loss or damage by fire *which shall happen or arise* from any foreign invasion, insurrection, riot or civil commotion, or any military or usurped power, or *by any explosion*, earthquake or hurricane, and the policy shall remain suspended, and of no effect, in respect to any loss that may happen to arise during the period of any of these contingencies."

A fire occurred which originated from, and was caused by, an explosion of one of the boilers of the steam engines belonging to and used in the factory, and covered by the policy.

Porter, J., in his opinion, p. 458, says: "The company * * * appeals to a mutual stipulation in the contract that the insurer should not be liable for injuries *resulting from* a particular cause. * * The insurer was to make good any injury to the property by fire; provided always that such fire should not be *caused by* any explosion," &c.

Parker, J., in his opinion, p. 45[illegible], says: There is no repugnancy between the insurance of the engine against loss by fire and the exception of loss and damage by fire *occasioned by* the explosion of the engine," &c.

In Western Ins. Co. *vs.* Cropper, 32 Penn., St. R., 351, the clause was:

"It is understood that this company is not liable for

any breakage or derangement of the engine, or bursting of the boiler, or any of the parts thereof."

Held that its purpose was only to relieve the underwriters from liability to indemnify the assured for broken or deranged machinery, and not to exempt them from the obligation to pay for a total loss, even though that loss could be traced back to the breakage of the machinery as its first cause. The Court said: "It would have been easy to have excepted '*all losses arising from*' breakage, &c., had such been the intention" and it will be seen that the construction given to the clause is in direct conflict with that given in Strong *vs.* Sun M. Ins. Co., and other cases hereinafter cited.

The expression, "no loss arising from petroleum," &c., means not only loss by fire which is occasioned by a spontaneous combustion or ignition, if such be possible as to which there is no evidence, but also a loss by fire occasioned by the presence of petroleum, whether it be ignited by a collision or by the application to it of a match, a firebrand, or other substance.

In Harper *v.* N. Y. City Ins. Co., 22 N. Y. R., 441, the policy covered plaintiff's stock, &c., as printers, and it was proven that the use of camphene was general among printers for cleaning ink rollers, &c. One of the printed conditions provided that the company would not be liable for any loss occasioned by camphene or other inflammable liquids.

The fire was occasioned by a workman throwing a lighted match into a pan containing camphene.

The Court of Appeals held that the exemption extended only to a loss occasioned by the use of camphene for purposes other than that of printing.

Selden, J., in his opinion (dissenting from the decision), uses the following language as to the meaning of the exempting clause, which is not in conflict with the decision made (p. 447): "Camphene must be the primary cause of the loss in order to absolve the

company from responsibility. The counsel seems to suppose that, in order to exempt the company, it is necessary that the fire which produces the loss should have been originated by camphene, but this, I think, is not essential The language of the provision is,—any loss occasioned by camphene. If, therefore, the fire, although it existed, would have been wholly innocuous but for its having come in contact with the camphene, "the loss which ensues may properly be said to have been caused by camphene. In such a case there would, but for the camphene, have been no loss."

In the case before the court the collision would have been wholly innocuous but for the contact with the petroleum, and but for the patroleum there would have been no loss.

And on p. 448, Judge Selden says: "It is argued that the camphene cannot be said to have caused the fire in this case, because the match was ignited before it came in contact with the inflammable liquid. The camphene, it is said, may have caused the flame to spread and become uncontrolable, but that this does not make it the original cause of the fire. But if the camphene cannot be said to have caused the fire in this case, it could not, for the same reason, in any case where the combustion of the camphene was produced by any material previously ignited. This necessarily reduces the operation of the provision upon the construction now assumed to those cases only where the camphene becomes ignited in consequence of its own inherent inflammable nature; in other words, to cases of spontaneous combustion, if such a thing is possible."

And adds that such a position cannot be maintained; and at p. 449: "Indeed it would hardly seem necessary to resort to any very refined reasoning to prove that a loss, no part of which would ever have occurred

but for the presence of camphene, may fairly be said to have been occasioned by camphene."

See also,

Strong *vs.* Sun Mut Ins. Co., 31 N. Y. R., 103.

Barton *vs.* Home Ins. Co., 42 Mo., 156.

Stanley *vs.* Western Ins. Co., 3 L. R. Exch., 71.

St. John *vs.* Am. Mut. Ins. Co., 11 N. Y. R., 516.

The immediate efficient cause of the loss here was blazing petroleum. The fire was petroleum in flames. Back of this for the *causa causans*, *i. e.*, the collision, it is not necessary to go.

As quiescent petroleum could not burn anything, the contract necessarily contemplated the contingency of its being ignited by the application or contact of some external force or substance, and excepted all loss thence arising.

The contract should be construed as if nothing were stated about collision. That clause is redundant, for without it the insurer would not be liable for loss caused by collision alone, and would be liable for loss *by fire* caused by collision.

It is as if the contract read "insures against loss or damage by fire, except such loss as may arise from petroleum," &c.; or, if the collision is to be noticed, "the company will pay loss by fire which ensues (*i. e.*, follows or succeeds) a collision, provided such loss does not arise from (*i. e.*, does not result from, or is not occasioned by) petroleum."

If the collision is to be taken into view because a fire ensued, such fire ensued from a collision with petroleum, an excepted hazard. Loss by the collision is excepted. The immediate effect of the collision was to set petroleum on fire, and such fire consumed the property. Thus, the fire that ensued (*i. e.*, followed or

succeeded) the collision arose from (*i. e.*, resulted from or was occasioned by) the petroleum.

It is certain that *the loss* by such fire arose from petroleum; burning petroleum destroyed the property and caused the loss.

The words "other explosive oils" have no other meaning or application than to designate a class of earth oils similar in origin and peculiarities to petroleum, in contradistinction to animal and other harmless oils.

The explosion of petroleum without application of heat, if such an occurrence were possible, could not cause a loss *by fire*. If exploded by application of fire or the impact of the express train its character, indicated by the word "explosive," insured devastation by fire thus started. No spontaneous explosion of petroleum could have been contemplated, and no provision for exemption from loss thereby was desired, for such a loss, *i. e.*, crushing, breaking or straining, &c., is not within the policy at all.

The learned judge, in giving his reasons for denying defendants' and granting plaintiff's motion, fell into an error upon this question, in treating the clause under consideration as having been inserted for the purpose of exempting the defendant from liability for loss occasioned by the explosion of petroleum.

Strictly speaking there was no explosion. The fact is that upon the collision the petroleum was ignited and burst into flames. If the expression "burst into flames" is to be interpreted as an explosion, the collision and explosion were simultaneous; no fire preceded either, and none succeeded, for the explosion was the fire and destroyed the property; fire did not ensue. There was really no sequence of collision, explosion and fire, but all coincided, and caused and were one catastrophe.

The printed explosion clause at the end of the policy hereinbefore quoted fully provides for all cases

of an explosion and fire ensuing; therefore the special clause as to petroleum by well-settled rules must be held to have been inserted for other cases and for other and further exemption or restriction of liability.

Upon the facts of this case it may also be and is justly claimed that the loss was occasioned *by the collision*, and that there was not, in fact, an ensuing fire within the fair interpretation of the policies.

If so, the insurers clearly were not liable.

In Evans *v.* Columbia Ins. Co., 44 N. Y. R., 146, the policy excepted loss by bursting of boilers, but covered *that occurring subsequent to and in consequence of such bursting.*

Held, That it did not cover a total loss occasioned by an explosion so violent as to tear open the sides of the vessels to such an extent that the water admitted sank her in five or ten minutes. As the vessel was manifestly worthless the moment the explosion had occurred the loss was immediate upon, not subsequent to, the explosion within the meaning of the policy.

Applying the same principle of interpretation to the case before the court will lead to the conclusion that here the collision with petroleum did of itself, without an appreciable interval of time or intervention of other cause or agent, destroy the property in question, and that the provision in the policy as to fire ensuing a collision cannot fairly and reasonably be held to apply to the bursting into irresistible destructive flames of the petroleum.

The same conclusion results if the bursting into flames of the petroleum be taken as an explosion.

See Ins. Co. *v.* Tweed, 7 Wall., 44.

Stanley *v.* West. Ins. Co., 3 L. R. Exch., 71.

Harper *v.* N. Y. City Ins. Co., *supra*, Selden, J., 447–8.

There is no foundation for a claim that the clause in question meant "loss sustained by the destruction of petroleum in course of transportation by the assured," nor that it can be restricted to a loss arising from petroleum carried by the assured and accompanying the property insured.

The language does not admit of so narrow a construction; and

The printed petroleum clause at the end of the policy hereinbefore quoted fully provides for such cases and protects the insurer from liability in either of such contingencies. The special clause therefore must refer to other conditions, risks and contingencies.

If the contention of the plaintiff in error, as to the object and meaning of this special clause, is not correct, it is difficult if not impossible to conceive for what purpose it was inserted in the policy.

That the defendant in error, before suit, interpreted the clause substantially as now claimed by plaintiff in error, seems clear from the fact that in the proofs of loss first served, long after the company had claimed that the loss was from an excepted risk, in undertaking to state in what manner and from what cause the fire originated, the assured stated "that the fire originated *from accidental causes*," and in the second proof stated "that the fire originated from a collision," &c.—carefully and deliberately avoiding mention of the presence of petroleum and its terrible effect.

Second.

THE LAPSE OF MORE THAN TWELVE MONTHS AFTER THE LOSS OCCURRED, BEFORE THE COMMENCEMENT OF THIS ACTION, IS AN ABSOLUTE BAR THERETO.

The legality and propriety of the condition of the

policies requiring suit to be brought within a specified time, cannot now be questioned.

Riddlesbarger *v.* Hartford Ins. Co., 7 Wall., 386.

Cray *v.* Hartford Ins. Co., 1 Blatchf., 280.

Curtis *v.* Home Ins. Co., 1 Bissell C. C, R., 485.

Wilson *v,* Ætna Ins. Co., 27 Vermont, 99.

Ripley *v.* Ætna Ins. Co., 30 N. Y., 136.

Roach *v.* N. Y. & Erie Ins. Co., 30 N. Y., 546.

Peoria Ins. Co. *v.* Whitehill, 25 Ill., 466.

Underwriters' Agency *v.* Sutherlin, 55 Georgia, 266.

Provincial Ins. Co. *v.* Ætna Ins. Co., 16 Upper Canada Q. B., 135.

"By this condition, the right to indemnity in case of loss and the liability of the company therefor, do not become absolute unless the remedy is sought within the twelve months. The stipulation goes to the right as well as to the remedy. The time within which the remedy is to be enforced is prescribed for the purpose of reaching and regulating the rights of the insured under the contract. Although the condition is subsequent, it is as operative and binding as a condition precedent."

Nelson J. Cray *v.* Hartford Ins. Co., *supra*, p. 288.

"This stipulation is too explicit to allow of any escape from its import by construction. It is not that an action shall be commenced within twelve months, but that no recovery shall be had unless such action is commenced within twelve months after the loss."

Redfield, Ch. J., Wilson *v.* Ætna Ins. Co., *supra*, p. 102.

Breese, J., Peoria Ins. Co. *v.* Whitehill, *supra.* p. 473.

The only answers to the contention of the plaintiff in error on this point hitherto made, are:

1. That the period of twelve months does not begin to run until the cause of action accrues.

2. That the plaintiff in error waived the condition, or is estopped to avail itself of it.

The ruling of the Circuit Judge on this point was really based upon the first of these answers and upon the authority of *The Mayor v. Hamilton Insurance Co.*, 39 *N. Y. R.*, 45.

That case cannot be considered as an authority, because the condition as to payment of losses and limitation were peculiar and widely different from those in the case before the court. The condition as to payment of losses read: "Payment of losses shall be made in sixty days *from the date of the adjustment of the preliminary proofs of loss by the parties;* and that as to limitation, read: "unless such suit shall be commenced within the term of six months after any loss or damage shall *accrue;*" and upon the peculiar phraseology of those conditions the decision was made that the period limited began to run at the expiration of sixty days *after the adjustment of preliminary proofs*, the court construing the policy as in effect similar to those wherein the limitation is "*after the cause of action shall accrue.*" It says, p. 47: "Within six months after the right of action shall have accrued, was, no doubt, what the parties intended."

The view taken by the court of the character of a condition limiting the time for commencing action is widely different from that taken by this court and the courts of other States in the cases above cited.

But that the condition in question cannot, in the case before the court, be so interpreted, has been expressly decided by this court in Semmes *vs.* Hartford Ins. Co., 13 Wallace, 158. This court, per Miller, J., p. 161, says:

"It is not said, as in a statute, that a plaintiff shall have twelve months from the time *his cause of action accrued* to commence suit, but twelve months from the time of the loss. Yet, by another condition, the loss is not payable until sixty days after it shall have been ascertained and proved. The condition is that no suit or action shall be sustainable unless commenced within *the term of twelve months next after the loss shall occur*," &c. * * "Now this contract relates to the twelve months next succeeding the occurrence of the loss."

Also by the Queen's Bench, Upper Canada, in Provincial Ins. Co. *v.* Ætna Ins. Co., above cited (see Robinson, J., p. 138). Also in Carraway *v.* Merchants' Ins. Co., 26 La. Annual, 298.

The only act or circumstances upon which a claim of waiver or estoppel has been suggested is the note of the agent of plaintiff in error to defendant in error of January 29, 1872 (transcript, p. 31), stating that the proofs of loss "are deficient in at least one particular, the origin and cause of the fire, and we therefore object to the proofs you have rendered us."

The reference here was to the palpably deliberate omission of the defendant in error in the first proofs to give a fair, full, or just statement of the "origin and cause of the fire." He had stated, in the proofs, in November, 1871, nine months after the plaintiff in error had sent the letter of February 14, 1871, "that the fire originated from accidental causes;" and the only reason for, and object of the letter of January 29, 1872, was to inform defendant in error that such statement was evasive, and that no assent thereto should be inferred by omitting to notice it.

However this may be, it is clear that if any proofs of loss were necessary it was the duty of the defendant in error to have made them properly and truthfully, and if he deliberately inserted the statement in question and failed to comply with the contract in this respect, the plaintiff in error was under no obligation to correct or instruct him, and the defendant in error can

derive no advantage from the act itself (a clear *suppressio veri*) nor from the note of the agent calling his attention thereto.

No proofs of loss were necessary. By the letter of February 14, 1871, the plaintiff in error dispensed with and waived the presentation of any proofs, for in that the defendant in error was explicitly informed that the plaintiff in error denied any liability for the loss in question, and repudiated any and all claims therefor. From the position then taken the plaintiff in error never receded.

The defendant in error could have commenced his suit immediately thereafter.

N. & N. Y. Transp. Co. *v.* West. Mass. Ins. Co., 6 Blatchf., 241 (affirmed, 12 Wall., 201).

Dean *v.* Ætna Life Ins. Co., 4 N. Y. Supreme (Thompson *v.* Cook) 503, 505.

No objection whatever to the proofs of loss served in November, 1871, having been made until after the expiration of sixty days after such service, the objection in the letter of January 29, 1872, was too late, and defendant in error was not required to notice it. The service was on November 29, 1872, sixty days thereafter expired January 28, 1872.

Jones *v.* Mechanics' Ins. Co., 36 N. J. Law, p. 29.

Bush *v.* Westchester Ins. Co., 2 N. Y. Supreme (Thompson *v.* Cook) 629.

Upon this question the defendant in error really takes this position:

Although it is well settled that your notice of February 14, 1871, waived any proofs of loss whatever, and enabled me to sue you immediately, and your failure to object to the proofs served for sixty days thereafter deprived you of the right to object to them; yet, to enable me to destroy your condition of limitation,

I will take and compel you to accept a position in direct antagonism to those mentioned, *i. e.*, that you did not waive any proof and did not waive objections to those served; and I will insist that your conduct amounts to a waiver of such condition or has created an estoppel against your availing yourself thereof, notwithstanding the fact that in the proofs of loss which I deemed proper to serve on you I deliberately violated my duty as to stating the origin and cause of the fire, and thus placed you in a position where if you were silent you would admit the sufficiency of such statement, and if you noticed or objected to it, I could serve corrected proofs and destroy your condition of limitation.

The contracts in question cannot be so construed as to give one party the power to destroy a condition inserted for the protection and benefit of the other party.

The only grounds upon which the courts have deprived the insurer of the benefit of the condition in question are fraud and the prevention by the insurer of the commencement of suits within the time limited. (Wilson *vs.* Ætna Ins. Co. *supra*; Curtis *vs.* Home Ins. Co. *supra.*)

And in such cases there must be proper averments in the declaration of the facts. (Peoria Ins. Co. *vs.* Whitehill, *supra.*)

In this case the declaration avers that the defendant in error duly fulfilled all the conditions of said insurance on his part.

If the proofs of loss, served in November, 1871, had been then correctly made, as defendant in error was then able and bound to make them, if any were needed—in other words, if he had then duly fulfilled the condition as to proof of loss—abundant time would have remained to enable him to wait sixty days, and then commence suit within twelve months after loss.

The omission or evasion referred to by the agent of

the plaintiff in error, having been the deliberate act of the defendant in error, his present position is in direct conflict with his assertion in the declaration that he fulfilled all the conditions on his part.

In Ripley *vs.* Ætna Ins. Co. *supra*, the jury were instructed that if the defendant suggested a postponement until certain attachments were removed, and at the same time were silent in regard to the limitation that would be a waiver of the condition limiting time for bringing suit:

Held, erroneous, and the rule as to waiver, laid down as follows (30 N. Y. R., 164):

"A waiver, to be operative, must be supported by an agreement founded on a valuable consideration; or the act relied on as a waiver must be such as to estop a party from insisting on a performance of the contract or forfeiture of the condition."

In the language of the court, there used, the plaintiff in error here confidently asserts, "There is not in this case any agreement to waive the condition requiring the suit to be brought within a year, nor is the defendant estopped from insisting on the condition."

In Ames *vs.* Union Ins. Co., 14 N. Y. R., 253, the language of the policy and the facts were peculiar. Loss was payable "in ninety days after due proof of loss, *amended and completed, shall have been filed* in the office of the company." Eighty-five days after the proofs were served the company notified the assured of an omission to state whether the property was incumbered; the assured supplied the defect, *i. e.* amended and completed the proofs.

Before the expiration of ninety days from this amending of proofs, and within three days of the expiration of the time limited for bringing suit, the com-

pany notified the assured that the loss *would be due* on a certain day, and *would then be paid*.

Upon this contract and facts the court *held* that the limitation was waived.

If this case were well determined, it can in no wise govern or affect the case before the court.

Because of the errors assigned the judgment should be reversed.

N. B. HOXIE,
Of Counsel for Plaintiff in Errror.

EVENING POST STEAM PRESSES, 208 Broadway, cor. Fulton St., N. Y.

Supreme Court

OF THE UNITED STATES.

THE IMPERIAL FIRE INSURANCE Company of London,
Plaintiff in Error,

agst.

WILLIAM G. FARGO, AS PRESIDENT of the American Merchants' Union Express Company,
Defendant in Error.

Points for Defendant in Error.

This action was brought by William G. Fargo, the plaintiff below, as president of the American Merchants' Union Express Company, to recover against The Imperial Fire Insurance Co. the defendants below, for a loss under two policies issued by the company—one on the 21st of May, 1870 (Exhibit A, *p.* 12), the other on the 27th of September, 1870 (Exhibit B, *p.* 17). The policies were alike in reference to the questions involved in this action.

A verdict was directed in favor of plaintiff, for $5,396.54 (*p.* 36, *fol.* 78), and the defendants bring error.

The entire loss caused by the fire was $22,512.55, of which the verdict represented the proportion chargeable against the defendants, as between them and other companies insuring the same risk. The only defenses made below were (1) that the suit was not brought within twelve months next after the loss, and (2) that the loss itself was not within the risks covered by the policy.

I.—The defense that the action was not commenced within twelve months after the loss arises under the following provision of the policy (*p.* 16):

"13. It is furthermore hereby expressly provided, that " no suit or action of any kind against said company " for the recovery of any claim, upon, under or by vir- " tue of this policy, shall be sustainable in any court " of law or chancery unless such suit or action shall " be commenced within the term of twelve months " next after such loss or damage shall occur. And in " case any such suit or action shall be commenced " against said company after the expiration of twelve " months next after such loss or damage shall occur, " the lapse of time shall be taken and deemed as con- " clusive against the validity of the claim thereby so " attempted to be enforced."

The loss occurred on the 6th of February, 1871, and the action was commenced in the Court of Common Pleas for the City and County of New York, on the 11th day of April, 1872, from which court it was subsequently removed to the Circuit Court of the United States.

Notice of the fire was given to the company on the 7th of February, 1871, the day after its occurrence (*p.* 27).

Proofs of loss were delivered on the 29th of November, 1871 (*p.* 28). These proofs were retained by the company for two months, when, on the 29th of January, 1872, the company gave notice, by letter of that date, that they were unsatisfactory (*p.* 31.) The plaintiff then furnished additional proofs, which were delivered to the defendant on the 8th of February, 1872 (*pp.* 31, 32).

By the 10th clause of the policies (*p.* 15), persons sustaining loss or damage by fire are [illegible] to give most particular and detailed state[illegible] property destroyed, and its value, an[illegible] of the fire and other particulars, as w[illegible] erence to the clause which, at the end of it (*p.* [illegible] provides:

"And until such proofs, declarations and certificates "are produced, and such appraisals and examinations "of property permitted by the claimant, *the loss shall* "*not be payable.*"

The Court below held, that construing this provision in connection with the short limitation embraced in the 13th clause, both being conditions imposed by the company, the limitation did not begin to run until the loss became payable so that an action could be commenced. There was no suggestion that the plaintiff had not been diligent in furnishing the proofs. The property destroyed consisted of numerous parcels delivered to the assured as express carriers, and it necessarily took much time to ascertain from the various consignors of the goods the contents of the packages and their value. Besides, any suggestion of want of diligence would have been met by the delay of the defendants in retaining the proofs of loss first served, from the 27th day of November until the 29th of the following January, before they made their objection of insufficiency.

On this point, therefore, the question is simply whether the short limitation of one year imposed by the 13th clause is absolute and peremptory so that after February 6th, 1872, all claim against the company ceased.

Under a similar policy the Court of Appeals in New York, in a carefully considered opinion, held that the limitation is to be construed in connection with the other conditions of the policy, and that the time begins to run from the date when, by those other provisions, a suit could be commenced for the loss. (*Mayor of N. Y.* v. *Hamilton Fire Ins. Co.*, 39 N. Y., 45).

This case has been followed in a late decision of the Supreme Court in New York (*Mix* v. *The Andes Ins. Co.*, 9 *Hun.*, 397), and the rule of construction is a settled one in that State. It ought to govern the case at bar not only on the ground of its reasonableness, but also because the policy was executed in New York and the loss occurred in that State. See also, *May on Ins.*, § 487; *Chandler* v. *St. Paul Ins. Co.*, 21 *Minn.*, 85; *Semmes* v. *City Fire Ins. Co.*, 13 *Wall*, 159.

II.—The other defence is that the loss was not covered by the policy.

The plaintiffs below were insured as express carriers, and by the terms of the policy (*p.* 12), they were insured "from loss or damage *by fire*, viz.: on "goods, wares and merchandise in their care for "transportation, while on board cars or other conveyances, including water and stage routes, embracing "the entire routes of said company" as designated on a map, &c. The policy provided as a condition "that "it is to attach only on the above mentioned "property while actually on board cars or other conveyances as above described or while in transit to

" and from the different places on the routes of said " company as above designated and while loading and " reloading at any point on said routes."

Then followed the provision under which the question in this case arises: " It is a further condition of this insurance that no loss is to be paid in case of collision except fire ensue and then only for the loss and damage by fire, and that no loss is to be paid arising from petroleum or other explosive oils."

The above were special provisions inserted for this insurance in the blanks of the two policies in question, which contained other general printed provisions not specially prescribed for this insurance; among others, the provisions as to proofs of loss and the short limitation enumerated above, and also a special provision (*p.* 16, 17), against keeping petroleum and other *inflammable* liquids on the premises insured, and the following (*p.* 17): " If any property covered by this insurance be damaged by lightning or the bursting of a boiler or by explosion from any cause, this company shall not be liable therefor unless fire ensue and then for the loss by fire only, which shall be determined by the value of the damaged property after the casualty by explosion or lightning."

The circumstances of the loss are stated in the agreed statement of facts (*pp.* 26, 27), as follows:

" On February 6th, 1871, an oil freight train of said railroad was on its way from the City of Albany to the City of New York, on the westerly track of said railroad. Such train was composed mainly of oil cars, so called, the same being trucks or platforms, having upon them, respectively, two large wooden tanks, with iron hoops; one of said tanks at each end of said trucks or platforms, and each tank containing several thousand gallons of petroleum."

" By the breaking of an axle, one of said oil cars was thrown from or left the said westerly track, and

so left and situated that it stood across the easterly track of said railroad, upon the bridge next south of the tunnel at New Hamburgh,"

"While said oil car was so situated, an express passenger train of said railroad company, composed of locomotive and tender, baggage car, express freight car, five sleeping cars, and one ordinary passenger car, connected in the order stated, was on its way from said City of New York to said City of Albany, upon said easterly track of said railroad. In said express freight car was a large quantity of merchandise in the possession of the plaintiffs and in course of transportation by them.

"Said express passenger train was proceeding at a high rate of speed, and while so proceeding, at or about the hour of ten o'clock in the evening of said sixth day of February, 1871, struck one of the said oil tanks upon said oil car standing across said easterly track of said railroad, upon said bridge, as before mentioned.

"Immediately upon said collision the said petroleum in said tank so struck was in some way ignited and burst into flames, which surrounded and enveloped the locomotive and tender, baggage car, express freight car, and first, second and third sleeping cars of said express passenger train, and consumed the bridge, the baggage car and its contents, the express freight car and most of its contents, and the first, second and third sleeping cars, with many of the passengers therein.

"In consequence of the immense mass and rapid and irresistible spread and progress of such flames, it was impossible to save any of said cars, property or lives so destroyed.

"There was no petroleum or other explosive oil in or upon either of said trains, in the possession of or under the control of the plaintiff."

This statement shows that the express car of the plaintiff containing the property insured was with

that property actually destroyed *by fire*. It also shows that the fire was previously communicated to a tank of petrolum, not a part of the same train, the tank being struck by the engine which drew plaintiffs' car. There was no evidence of any explosion of that tank, and the only inference that can be drawn from the agreed statement of facts, is that it was broken by the collision, and took fire, probably from the fire of the engine which struck it.

There was no evidence that any damage would have been caused to plaintiffs' goods from the collision itself if fire had not ensued. It was the combustion of the car following the collision which caused the destruction of plaintiffs' goods. So far, therefore, the loss is within the general risk of *fire*, insured against by the policy, and is not excluded by the condition directly applicable to the case, "that no loss is to be paid in case of collision, except fire ensue, and then only for the loss and damage by fire." This is an agreemen t that though the fire ensue from a collision, if the loss claimed is by combustion and not from mere breakage, the company is liable.

III.—But the defendants claimed that the words "and that no loss is to be paid arising from petroleum or other explosive oils" exempted them absolutely.

The position of this language in the policy is so special that little aid in its construction can be derived from authority, and the circumstances of the loss were so peculiar that one can hardly speculate as to what, in respect to them, would be called the intention of the parties. But the following suggestions are submitted :

(1.) The clause is very loosely penned, and, therefore, should not be construed to deprive the assured of indemnity unless such a construction is imperative.

Hoffman v. *Ætna Ins. Co.*, 32 *N. Y.*, 405; *Cropper* v. *Western Ins. Co.*, 32 *Penn. St.*, 351; *Comm. Ins. Co.* v. *Robinson*, 64 *Ill.*, 265; *May on Insurance*, 181, 182:

"The contract of insurance being one of indemnity to the assured it is most consonant to the intent of the parties to construe it so that the extent of the indemnity shall be as great as a just interpretation of its terms will fairly admit. Especially in giving construction to an exception from the risks enumerated in the body of the policy."

Dole v. *New England, &c., Ins. Co.*, 88 *Mass.* (6 *Allen*), 373, 385.

"All its (the policy's) exceptions and reservations are those of the defendant. The rule is that when in such cases the language requires construction it shall be taken most strongly against the party making the instrument."

Per MILLER, J., in *Insurance Companies* v. *Wright*, 1 *Wall.*, 456, 468.

And that the construction should be reasonable, the cases which hold that the use of hazardous articles during temporary repairs do not violate a condition against keeping hazardous articles, and similar cases, are illustrations.

Vide O'Neil v. *Buffalo Ins. Co.*, 3 *N. Y.*, 122; *Billings* v. *Tolland Co. Ins. Co.*, 20 *Conn.*, 139; *Harper* v. *Albany Mut. Ins. Co.*, 17 *N. Y.*, 194, 22 *Id.*, 441; *Buchanan* v. *Ex. Fire Ins. Co.*, 61 *N. Y.*, 26.

(2.) The clause may be fairly construed so as to read: "Arising from petroleum, or other explosive oils, *carried by the parties insured.*" This is a reasonable in-

terpretation of it looking at the contract in its entire scope, and considering the business of the assured. So construed it is an application to them as carriers of the general restriction (*p.* 16) against keeping petroleum and other explosive oils upon the premises insured. Other parties shall not keep, these shall not carry petroleum, &c.

(3.) But if this is deemed too rigid a construction of the clause it may be read: "No loss is to be paid arising from petroleum, or other explosive oils, carried upon the same train of cars, or other conveyance used by the parties insured."

Both these constructions are reasonable in imposing a restriction that the assured can comply with. He can avoid carrying petroleum; he can refuse to carry his goods on any train on which petroleum is carried.

(4.) But the construction claimed by the defendants below is that the phrase "loss arising from petroleum or other explosive oils" means loss with which petroleum has anything whatever to do.

This, it is submitted, gives too broad a meaning to it.

So construed, a loss on goods in a depot consumed by a fire, which originated at a distance, would not be covered, if it could be shown that at any point in the progress of the fire petroleum had contributed to its spread.

(5.) The words "loss arising from petroleum or other *explosive* oils" suggest that damage caused by *explosion* occasioning *fire* was the risk excluded. The words are petroleum or other *explosive*, not other *inflammable* oils.

This view harmonizes with the clause in reference to losses from collision. "No loss is to be paid in case of collision, except fire ensue, and then only for the loss and damage by fire."

"No loss is to be paid arising from petroleum or other explosive oils,"—that is, no loss from the explosion of such oils,—even though fire, which is the

principal risk insured against, result from the explosion.

This was the view of the judge at the trial (*p.* 37), and is confirmed by *Commercial Ins. Co.* v. *Robinson*, 64 *Ill.*, 265.

If the clause had been "no loss is to be paid arising from *fire caused by petroleum*" it would have been stronger in favor of the insurer.

(6.) But taking the language as it is, the question still remains, did the loss in fact *arise* from the petroleum or from the fire? If the facts showed that the petroleum *originated* the fire, the defence might prevail, but the fire undoubtedly came from the train which struck the tanks, probably from the locomotive; the petroleum *communicated* the fire which consumed the goods insured, but the fire did not *arise*, nor did, in the words of the clause, the loss *arise*, that is, take its rise or origin, in the petroleum, though that contributed to the suddenness of the flames.

It is open to argument that the collision itself, though the tank struck had been an empty one, would, by the scattering of fire among the fragments of the broken cars, have consumed the express car. Trains are frequently set on fire by the overturning of stoves, following a collision.

It is submitted that, to avail themselves of this clause, the defendants should have shown that the fire was caused by, or *originated* in the petroleum.

In the case of *Insurance Co.* vs. *Tweed*, 7 *Wall*, 44, the policy excepted loss or damage by fire which might *happen* or *take place* by *means* of any invasion, *explosion*, &c. The loss sued for was a loss by fire, but the originating cause was an explosion, from which a fire resulted, which spread so as to burn the property insured. This was, therefore, within the very terms of the exception. The general rule is, indeed, that, under an insurance against fire, the court does not ordinarily

look further than to see that the fire is the proximate cause of the loss; but when fire is itself excepted, if it originate in a certain manner, this rule cannot govern.

In the case just cited, loss by fire was excluded which might *happen* or *take place by means of* any explosion, embracing, therefore, any loss by fire in which an explosion was a contributory cause. In the case at bar, however, the company was not exempted unless the loss *arose from* the petroleum, which was not the fact if the petroleum merely communicated the fire which was brought into contact with it from another cause.

In the case of *Ins. Co.* vs. *Tweed*, it could hardly have been said that the loss was one "arising from" the house which was between the place of the explosion and the warehouse in which was the cotton insured.

In *Sohier* vs. *Norwich Fire Ins. Co.*, 93 *Mass.* (11 *Allen*), 336, in a policy against fire upon a theatre, loss by fire "which may *originate* in the theatre proper" was excepted. The loss was caused by a fire outside heating the walls of the theatre so hot as to set fire to the woodwork within. Held, that the fire did not originate in the theatre, being the result of the fire outside, and that the insurer was liable.

IV.—The conclusion of our argument is, that the loss being by *fire*, and by a fire which was clearly the consequence of the *collision*, is expressly covered by the policy; that to exempt the insurer it should have appeared that the loss *arose* from the petroleum, and further, that the clause in reference to petroleum, construed with reference to all the other provisions of the policy, excluded only losses to which the *explosion* of petroleum contributed, and that, even in that case, it